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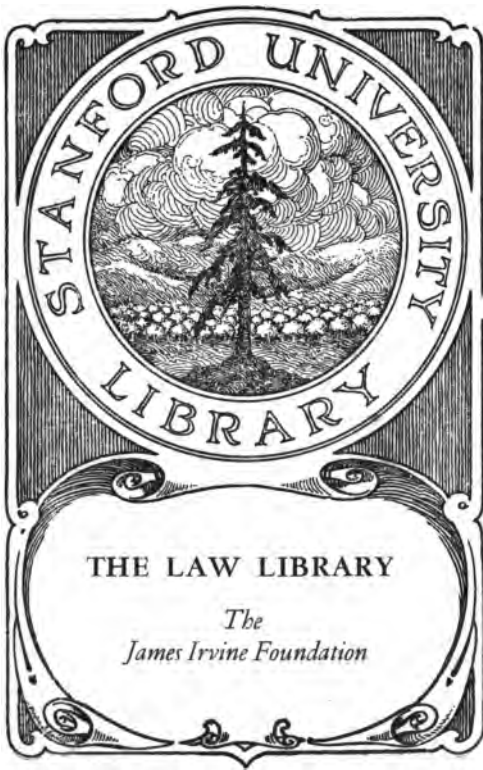
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LECTURES ¹⁸²²

ON THE
CONSTITUTION AND LAWS OF
ENGLAND :

WITH A
COMMENTARY ON MAGNA CHARTA,
AND ILLUSTRATIONS OF MANY OF THE
ENGLISH STATUTES.

BY THE LATE
FRANCIS STOUGHTON SULLIVAN, LL. D.
ROYAL PROFESSOR OF COMMON LAW IN THE UNIVERSITY OF DUBLIN.

TO WHICH AUTHORITIES ARE ADDED, AND A DISCOURSE
IS PREFIXED, CONCERNING THE LAWS AND
GOVERNMENT OF ENGLAND.

BY GILBERT STUART, LL. D.

FIRST AMERICAN EDITION.

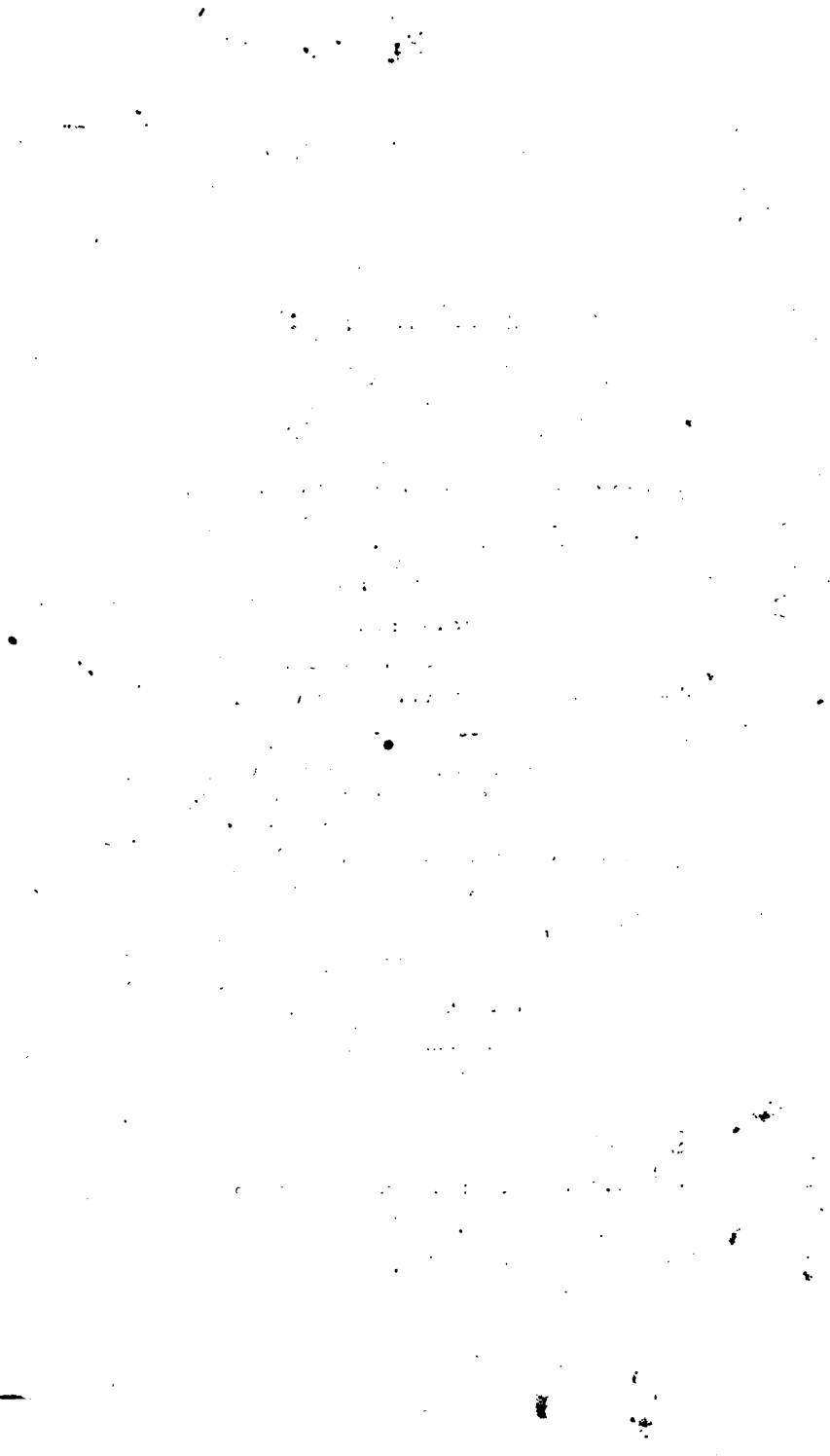
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LECTURES
ON THE
LAWS OF ENGLAND.

LECTURE XX.

Lords of Parliament or Peers....Earls and Barons....The earlier state of Baronies in England....The Barones majores and minores....Barons by writ and by letters patent....The different ranks of Nobility.

NEXT in rank to the king are the *lords*, that held immediately of him by military service, as long as that species of tenure subsisted ; and whom, from their privilege of sitting in Parliament in their own rights, are frequently called *Lords of Parliament*, and in common speech are called *Peers*, though that word properly signifies any *co-vassals* to the same lord. Thus every immediate vassal of a baron are peers of that barony, and the accurate description of the great personages I am speaking of is *Pares Regni*. Of these there were, anciently, two ranks only, in England, *Earls* and *Barons*. Indeed, abroad also, to speak properly, there were but two likewise : for there was no difference in power and privilege between the *dukes* and *counts*, or *earls*. But as every

earl is a baron, and something more, and as it is a maxim of our law, that every lord of parliament sits there by virtue of his barony, it will, in the first place, be necessary to see what a baron is.

The word *baron* of itself originally, did not, more than peer, signify an immediate vassal of the king ; for earls palatine had their barons, that is, their immediate tenants ; and, in old records, the citizens of London are stiled barons, and so are the representatives of the cinque ports called to this day. Baron, therefore, at first signified only the immediate tenant of that superior whose baron he is said to be, but by length of time it became restrained to those who, properly and exactly speaking, were *barones regis & regni*, and even not to all of these, but to such only as had manors and courts therein. For though, by the principles of the feudal constitutions, every immediate military tenant of the crown, however small his holding, was obliged to assist the king with his advice, and entitled likewise to give or refuse his assent to any new law or subsidy, that is, to attend in parliament. This attendance was too heavy and burthensome upon such as had only one or two knights fees, and could not be complied with without their ruin. Hence arose the omission of issuing writs to such, and which, being for their ease, they acquiesced in, attendance in parliament being considered at that time as a burthen. Thus they lost that right they were entitled to by the nature of the tenure, until the method was found out of admitting them by representation. Hence arose the distinction between *tenants by barony*, and *tenants by knight service in capite* of the king. The former were such military ten-

ants of the king, as had estates so considerable as qualified them, without inconvenience, to attend in parliament, and who were therefore entitled to be summoned. The *quantum* of this estate was regularly thirteen knights fees and one third, as that of a count or earl was twenty ; that is, as a knight's fee was then reckoned at twenty pounds *per annum*, the baron's revenue was four hundred marks, or two hundred sixty six pounds thirteen shillings and fourpence, and the earl's four hundred pounds, answering in value of money at present to about two thousand six hundred, and four thousand pounds yearly*.

Such was the nature of all the baronies of England for about two hundred years after the conquest ; and they are called *baronies by tenure*, because the dignity and privileges were annexed to the lands they held ; and if these were alienated with the consent of the king (for without that they could not) the barony went over to the alienée. The manner of creating these barons was by investiture, that is, by arraying them with a robe of state, and a cap of honor, and girding on a sword, as the symbols of their dignity. Of these Matthew Paris tells us there were two hundred and fifty in the time of Henry the Third, and while they stood purely on this footing, it was not in the king's power to increase the number of the baronies, though of barons perhaps he might. For as William the Conqueror was obliged to gratify several of his great officers according to the number of men they brought, with two or more baronies, whenever these fell into the hands of the crown by escheat,

*Madox, *Antiq. of the Exchequer*, vol. 1. p. 197, 198.—*Baronia Anglica*, book 1. chap. 1 Spelman, *voc. Baro*.

either for want of heirs, or by forfeiture, it was in the king's power, and was his interest, to divide them into separate hands. The same thing likewise happened, when, by an intermarriage with an heiress, more baronies than one came into the hands of a nobleman, and escheated to the crown*.

But the number of these feudal baronies could not, strictly or properly speaking, be increased by the king ; for they could be created only out of lands, and there were no lands vacant to create new ones out of, for the king's demesne's were, in those days, unalienable. However, we find, at the end of Henry the Third's reign, and even in John's, that the number of baronies were actually increased, and a distinction made between the *barones majores*, and *minores*. The *majores* were those who stood upon the old footing of William, and had lands sufficient in law, namely, the number of knights fees requisite. The *minores* were such as held by part of a barony ; as when an old barony descended to, and was divided among sisters ; in which case, when the husband of the sister whom the king pleased to name, was the baron of parliament ; or else were newly carved out of the old baronies that had fallen in by escheat ; as supposing the king had granted six knights fees of an old barony to one, to hold with all the burthens, and to do the service of an entire barony, and the remaining seven and one third to another, on the same terms. But the attendance of these minor barons also, at length became too burthensome for their circumstances, and many of them were glad to be excused. The kings took then the power of passing by such as they thought

*Brady's introduction, in append. *Baronia Anglica*, p. 33.

unable, by not sending them writs of summons, and John extended his prerogative even to omit summoning such of the *majores* as he imagined were inclined to oppose him. This however at length he was obliged to give up: For in his Magna Charta it is said, *Ad habendum commune consilium regni faciemus summoneri archiepiscopos, episcopos, abbates, comites, & majores barones regni sigillatim, per literas nostras**.

The *barones majores* were then fully and plainly distinguished from the *minores*, and I think it will not be doubted they were such as had the full complement of knights fees that made up an ancient barony; and, accordingly, we find in 1255, when Henry the Third had neglected summoning some of these, the others refused to enter on any business, *Quia omnes, tunc temporis, non fuerunt, juxta tenorem Magnæ Chartæ suæ, vocati, et ideo, sine paribus suis, tunc absentibus, nullum voluerunt tunc responsum dare, vel auxilium concedere vel prestare.* No king since, ever omitted to summon all the greater nobility, until Charles the First was prevailed upon to forbid the sending a writ to the Earl of Bristol by Buckingham, who was afraid of being accused by that nobleman; but on the application of the house of lords, and their adjourning themselves from day to day, and doing no business, the writ at last was issued.

In the reign of Henry the Third also, the king's prerogative of summoning or omitting the lesser barons was likewise ascertained by an act of parliament since lost, as we find by these words from history:

*Selden's titles of honor, part 2. chap. 5. *Baronia Anglica*, book 1. chap. 2.

Ille enim rex (scilicet Henricus Tertius) post magnas perturbationes, & enormes vexationes inter ipsum regem, Simonem de Morteforti, & alios barones, motas & sopitas, statuit & ordinavit, quod omnes illi comites & barones regni Angliæ, quibus ipse rex dignatus est brevia summonitionis dirigere, venirent ad parlamentum suum; & non alii nisi, forte, dominus rex alia illa brevia illis dirigere voluisset.* And from henceforth no nobleman could sit in parliament without a writ. But there was this difference between the greater and the lesser barons, that the former had a right to their writ *ex debito justitiæ*, to the latter it was a matter of favor; but when summoned, they, being really barons, had the same rights with the rest, though sitting, not by any inherent title, but by virtue of the writ. The other lesser barons, who were generally omitted to be summoned, by degrees mixed with the other kings tenants in capite, and were thenceforth represented by the knights of the shires†.

But these baronies by tenure being long since worn out among the laity, it is proper to proceed to the two ways now in being of creating peers, by *writ*, and by *letters patent*. It is the lord Coke's opinion, and in this he has been followed ever since, that a writ to any man, baron, or no baron, to sit in parliament, if once he had taken his seat in pursuance thereof, gains a barony to him and the heirs of his body. And though the law, principally on the authority of that great lawyer, is now so settled, certainly it is comparatively but a novel opinion, and very ill to be supported by reason. The words of the writ are,

*Camden, Britan. p. 122.

†Selden, tit. Honor, part. 2. chap. 5. § 21.

Rex tali salutem, quia de advisamento & assensu concilii nostri, pro quibusdam arduis & urgentibus negotiis statum & defensionem regni nostri Angliæ contingentibus, quoddam parlamentum nostrum apud Westmonast. tali die, talis mensis, proximo futuro teneri ordinavimus, & ibidem vobiscum, ac cum prelatibus magnatibus & proceribus dicti regni nostri, colloquium habere & tractatum; vobis in fide & ligeantia quibus nobis tenemini, firmiter injungendo mandamus, quod consideratis dictorum negotiorum auctoritate & periculis imminentibus, cessante excusatione quacunque, dietis die & loco personaliter intersitis nobiscum ac cum prelatibus magnatibus & proceribus super dictis negotiis tractaturi, vestrumque consilium impensuri, et hoc sicut nos, & honorem nostrum, ac expeditionem, negotiorum prædictorum diligitis, nullatenus omittatis.*

That this writ must be obeyed, there is no doubt, for every subject is, by his allegiance, obliged to assist the king with faithful counsel: But what right the party summoned acquired thereby is the question. The words are not only personal to him, but restricted likewise to a particular place and time; and accordingly, in ancient times, we find many persons summoned to one parliament, omitted in the next, and summoned perhaps to the third. There is not a word therein that hints at giving the least right to an heir; and what reason can be assigned why a man, by this writ, should gain an estate of inheritance in a peerage, when, in letters patents, it is admitted that he gains only an estate for life, without the word *heirs*. That anciently there was no such notion appears from

*Baronia Anglica, book 2. chap. 1. Selden's tit. Hon. part 2. chap. 5. § 22.

the summons to parliament, where frequently we find the grandfather summoned, the father passed by, and the grandson afterwards summoned: Nay, in the rolls there are instances of ninety-eight persons being summoned a single time only, and neither themselves, nor any of their posterity ever taken notice of afterwards. Or, if we were to allow that this writ created an inheritance, what reason can be given why it should be an estate tail only, and be confined to the heirs of the body, and not, as all other new inheritances, created generally, go to the collateral heirs?

But in order to discover plainly what privileges persons so called by writ, had, or could obtain in those times, it will be proper to distinguish them into three kinds of persons. First, then, they were either some of the *minores barones by tenure*; and these, when called, had certainly all the privileges of the greater; or else they were not barons at all, but plain knights or gentlemen; and, with respect to these, it is plain they had a right to deliberate, debate, and advise. But the better opinion is, they had no right to vote, but were assistants and advisers only, as the judges are at present; for it is absurd to suppose that, in those times, when the commons were low and inconsiderable, and the barons were more powerful than the crown, these latter should suffer their resolutions to be over-ruled at the pleasure of the king, by his calling in such numbers as we find he often did, which must have been the case, if all he summoned had votes. But these two kinds of persons gained by their writ, or sitting in consequence of it, originally, no farther right than to be present at that time.... However, by many of these persons and their heirs

having been constantly summoned, especially since Henry the Seventh's reign, and the ancient practice of omitting any who had been very frequently so, going into disuse, the distinction between the greater and lesser barons was forgot, and that opinion prevailed which my lord Coke had adopted, and which is now the law, that a man, having once sat in parliament in pursuance of the king's writ, acquires thereby an estate tail to him and the heirs of his body*.

There were yet another kind of persons, not peers, that might be summoned by writ. These were the eldest sons of peers, to whom the father's barony must descend; and in such case, if the heir was called by the name of a barony that was in his father, he was a baron to all intents and purposes. But it seems very plain, that this was not a new creation of a barony; for in that case the son so called should have been the lowest peer, whereas the practice is the contrary. The eldest son of the duke of Norfolk, called by the title of lord Mowbray, sat first baron, because that barony of his father's is the ancientest in England. It seems, therefore, that this was considered as a transfer of the ancient barony by the joint consent of the father and king, and the father still continues to sit by the remaining peerage in him. Accordingly we find no instance of a baron's son sitting on such a summons, unless the father had another barony by which he might sit. If the father indeed had a higher title, that has been reckoned sufficient to support his seat, though his only barony was transferred to the son. This then being no new creation, but a

*Coke on Littleton, lib. 2. chap. 8. § 159. *Baronia Anglica*, p. 164. et seq.

temporary transfer only of an old peerage, it should seem, that this title, when once merged in the greater by the father's death, should go according to the old limitation; but of late we find them considered as new creations. On the death of the late earl of Derby, Sir Edward Stanley, his sixth cousin succeeded, and sits in parliament as baron Strange, by Henry the Seventh's creation: but an elder son of a former earl of Derby, having been called by writ while his father was living, the Duke of Athol, as his heir by the female line, sits by the same title of baron Strange of king Charles the First's creation.

The descent of these two kinds of baronies are directed by the rules of the descent of other inheritances at common law, and consequently females are capable of succession, but with two exceptions; first, that half blood is no impediment, and consequently, the half brother excludes the sister; secondly, that the honor is not divisible, and therefore, if there be two or more sisters, heiresses, the title is *in abeyance*, that is, is suspended, until the king makes choice of one of them and her heirs; though by constant usage the law seems to be verging fast to a constant descent to the eldest*.

The third method of creating peers is by *letters patent*, which is the most usual, and esteemed the most advantageous way; because a peerage is thereby created, though the new nobleman hath never taken his seat, which is not the case of a barony by writ. As to the manner of these creations, there has a notable difference intervened since the accession of Henry the

*Coke on Littleton, p. 166. St. Amand on the legislative power of England, p. 192.

Seventh from what was the practice before Richard the Second. In his eleventh year began this method of creating by patent, in favor of John de Beauchamp, who, though summoned, never sat there, but was attainted by the next parliament; and afterwards executed. But, the attainder out of the case, his patent in law could never have been deemed valid, because Michael de la Pole was the lord chancellor who affixed the seal to it, which had been before taken from him by act of parliament, and he declared incapable of ever having it again. This, then, was a single and ineffectual attempt of that weak prince to create a new peer without the assent of parliament, which was the usual way, above thirty having been made so in that very reign. His successors were too wise to follow this example; for every barony newly created, till the union of the roses, which were about fourteen, were, every one of them, as appears on the face of the patents, by authority of parliament, if we except two or three; and even these, on a close examination, will appear not to be new baronies, but *regrants* of old feudal baronies by tenure, which undoubtedly were all in the sole disposition of the king*.

But Henry the Seventh, having trodden down all opposition, was fortunate enough to carry the point Richard had vainly attempted, and acquired for his successors that prerogative which they have since enjoyed, of creating peers at pleasure. The descent of these titles, created by patent, is directed by the words of the creation. If heirs are not mentioned, it is only an estate for life; if to a man and heirs of his body, females are not excluded, but the general way is, to

*Selden, tit. Hon. part 2. chap. 5. § 27 and 28.

that Sir Thomas left daughters, to one of whom the title ought to have been assigned by the queen, one of them, and the heir of the other, who was dead in 1685, bargained, sold and released to Sir Theobald and his assigns, their right and title to the said honor. The other was the case of the honor of Kingsale. Charles the First, apprehending the barony of Kingsale to be extinguished by attainder, created Sir Dominick Sarsfield viscount Kingsale, but, upon lord Kingsale's petition, and proof made by him that his barony still subsisted, it was ordered that Sarsfield should surrender his viscounty of Kingsale, and be created viscount of Kilmallock, with his former precedence, which was accordingly done.

These two instances, were, indeed, of a particular nature and calculated to rectify grants that had arisen from error ; but in England there were, in ancient times, many instances of such surrenders without error. They were, indeed, generally made in order to obtain higher titles ; and therefore it is no wonder they passed *sub silentio*, and were never disputed. But as to the old baronies by tenure that were annexed to land, nothing is clearer than that, by the king's consent, they might be aliened or surrendered, notable instances of which happened in the reign of Henry the Third. Andrew Giffard, baron of Pomfret, surrendered to the king ; and Simon de Montfort, a nobleman of large possessions in France, had two sons by the heiress of the earldom of Leicester, in whose right he was earl of Leicester, and, having a mind to settle his second son in England, assigned the earldom over to him, as Selden says ; or, which comes to the same thing (for the eldest son was equally defeated) sur-

rendered it to the king, who granted it to the second, according to Camden.

All noblemen are equally so, and, therefore, each others peers; but they differ in rank and precedence. The ranks are five; *dukes, marquisses, earls, viscounts, barons*. The first duke was created by Edward the Third; the first marquis by Richard II.; the first viscount by Henry the Sixth. Though their dignities are now personal, and annexed to the blood, yet as they were originally annexed to land, so much of the old form remains, that, in their creation, they must be named from some place in some county; though I do not apprehend it to be material at this day, whether there really be such a place or not. With respect to the raising a lord from a lower degree of dignity to a higher, I should observe, that long before Henry the Seventh's time, the king had the right solely in himself, though it was frequently done in parliament; for this was not adding to the number of the peers, but an exertion of the ancient prerogative of his settling precedence according to his pleasure. This continued in England till Henry the Eighth, by act of parliament, settled it according to anciency, and it still continues in Ireland, though it has not been exerted since Henry the Seventh's time, when lord Kingsale, a Yorkist, was obliged to change places with lord Athenry, a Lancastrian, and from first became the second baron, which hath continued his rank, till lately, that Athenry was created an earl.*

*Camden's Introd. to his Britan. p. 234. et seq. *Baronia Anglica*. Selden, tit. hon. part 2. chap. 5. § 29. 30. 31.

LECTURE XXI.

Earls or Counts as distinguished from Barons....The office of Counts....Their condition after the conquest....Counties Palatine in England....Counties Palatine in Ireland....Spiritual Peers....The trials of Noblemen.

IN my last lecture I treated of baronies, which are the lowest rank of peerage, and of the right whereby this class of nobles sits in the great council of the nation, and also of the various methods that have prevailed in different ages of creating them ; but before I have done with the higher nobility, it will be necessary to say something of *earls* or *counts* as distinguished from barons ; for they differ from them, not only in having a greater number of knights fees, and consequently having a greater revenue, but in possessing also a more extensive jurisdiction. The institution of *counts*, I observed in a former lecture, wherein I treated of the progress of the feudal law, was not originally, a part of the feudal policy. They were, indeed, always chosen out of the king's companions, who resided in his house, and were therefore called *comites*, but they were not set to preside over Germans, who were the conquerors, but over such of the old inhabitants, Romans or Gauls, who by a voluntary submission had retained their freedom, and who, in every respect, except bearing a share in the legis-

lature or government, were on an equal footing with the conquerors*.

The office of these counts was threefold; to judge these freemen in peace, to conduct them in war, to manage the king's demesnes in their respective districts, and to account with him for them and the profits of his courts of justice; which were very considerable when all offences were punished by fines. At the beginning they were temporary officers, but they soon became fixed for life, and at length, towards the latter end of the second, and in the beginning of the third race in France, they got, through the weakness of the crown, estates in fee in their counties; and either by grants of the kings, or by usurpation, converted the profits they before accounted for to the crown, for their own use, and held the courts in their own name. In short, they became petty sovereigns, paying only homage, and the usual services of ward, marriage, and relief to their supreme lord; and as such they coined money, levied war against their neighbors, nay frequently against the king himself; until Lewis the Eleventh found the means of humbling them, and brought the crown out of tutelage, as the French express it†.

The present state of Germany is an exact representation of what the French and the other continental monarchies were in those days, except that the kings had large countries, and multitudes of vassals immediately subject to them; whereas the emperor hath

*Selden, tit. hon. part 2. ch. 1.

†Du Bos, hist. critique de L'établissements de la Monarchie Françoise, tom. 3. 497. &c. Mascou's hist. of the ancient Germans, b. 16. § 36.

now none. But in England these lords, tho' very powerful, never ascended to such a pinnacle of grandeur. Their first constitution here we must refer to the time of the division of England into counties, to which they had a reference which is generally ascribed to Alfred. Their power and office was exactly the same with the counts on the continent in those early times, namely, to judge and lead the freemen to war. For the greatest part of the lands of England were at that time allodial, as is proved, by Spelman, contrary to the opinion of Sir Edward Coke; although, with him, it must be allowed, that there were fiefs also before the conquest, and that they were not all introduced at that period. Till that time their office was only for life, and they were known by various names, as *duces*, *comites*, and *consules* in Latin, *ealdermen* in Saxon, and *earls* in the Danish tongue*.

But William, having turned all the lands into feudal, was obliged to put his earls on the same footing, that those on the continent were in his time, and consequently to make them hereditary. However he and his successors were careful not to give them such extensive powers and revenues as they had abroad.... The county courts were held in the king's name, neither were the earls allowed the whole profits of them, two-thirds of them being reserved to the king; and in appearance to ease them, who were often obliged to attend in council or in war, but in reality to prevent the king's being defrauded, and to prevent the too great influence which their judging in person might acquire to them in their districts, officers chosen by the people, and approved by the king, were substi-

*Spelman's treatise of Feuds and Tenures.

tuted to administer justice under the names of *vice comites*, or sheriffs; these were to pay to the king the two-thirds, and to the earl his third of the profits, which was in those times looked upon as so incident to an earldom, as to pass with it, although express words were wanting; so that in those times an earl and a county were correlatives†.

Each earl took his title from some one county, and the number of the one could not exceed that of the other. King John, however, altered their nature in some measure, and his example has been followed in depriving the earl of the thirds of the county profits; for he created Henry de Bohun earl of Hereford, and granted to him twenty pounds yearly, to be received out of the third penny of the county in lieu thereof. But it is plain that the justice and success of this invention was doubted of at first, for John took a collateral security from the earl, that he should never in his earldom claim any more than the twenty pounds expressly granted him. These sums, so granted, are called *creation money*, and were formerly expressly granted out of the third penny of the county; but of late have been made payable at the Exchequer. Such was the nature of the ancient earldoms that were by tenure, and had reference to counties. The modern ones, that are merely honorary, and go with the blood, were first made in parliament. Afterwards the king was allowed by his sole authority, to advance a baron to a higher rank; for that was not adding to the number of the peers; but the creation of a bare gentleman a peer at once hath only been practised since the accession of Henry the Seventh*.

†Selden, tit. hon. part 2. ch. 5.

*Selden, tit. hon. part 2. ch. 5. § 10.

Before I quit this head of earldoms, it will be proper to say somewhat about *counties palatine*, which had extraordinary privileges, like unto the counties and duchies abroad. The first was that of Chester, erected by the Conqueror, in favor of his nephew Hugh Lupus, in these words: *Totumque hunc comitatum tenendum sibi & hæredibus, ita libere ad gladium sicut ipse rex tenet Angliam ad coronam.* The effect of this creation was to have *jura regalia*; for the earl palatine might pardon treason, murder, and other offences, might make justices of assize, goal delivery, and of the peace; might create barons of his county palatine, and confer knighthood. They had likewise all forfeitures that arose by common law or by any prior statute; but forfeitures arising from statute, made after the erection of the county palatine, belonged to the king. They had courts as the king had at Westminster, and out of their chancery issued all writs, original and judicial. Neither did the king's writs run within the county palatine, except writs of error, which were in the nature of appeals, or in cases where, otherwise, there would be a failure of justice. All manner of indictments and processes were made in the name, and every trespass was laid to be done against the peace of him that had the county palatine. But these and some other privileges have been taken away, and annexed to the crown, in whose name they must now be; but the *teste* of the writs is still in the name of the earl palatine*.

Of these counties palatine there are now in Eng-

* *Baronia Anglica*, p. 150. et seq. Selden, tit. hon. part 2. chap. 5. § 8. Bacon, hist. and polit. discourse on the laws of England, part 1. chap. 29.

land four, Lancaster united to the crown, Chester to the principality of Wales ; Durham and Ely, each belonging to the bishop of the place ; but the privileges of these two are going fast into disuse. But in this kingdom, (Ireland) for the encouragement of adventurers, the whole country, as fast as it could be reduced, was erected into palatinates, and very little, except the cities, retained in the king's hand. The making so many great lords, who had frequent quarrels with each other, and that at such a distance from the seat of government, was one great occasion of the slowness of the settlement of the kingdom. For, to strengthen themselves, such of them as resided here attached the natives to them, and taught them the use of arms, and others that dwelt in England entirely neglected to send hither any defence, so that, by the end of Edward the Third's time, the Irish had repossessed themselves of almost the whole kingdom, if we except five or six counties ; whereas in John's reign they held not above half, and that under homage and tribute, either to the king, or the lords, who had grants from him.

I shall give a short detail of these palatinates, and an account of the manner of their distinguishment. The present county of Galway, under the name of the county of Connaught, was a palatinate in the De Burghs ; as was Ulster, first in De Courcy, then in De Lacy ; and these two were united by De Burgh's marriage with Lacy's daughter, and afterwards descended to Lionel of Clarence's daughter, who married the earl of March, and in the person of Edward the Fourth, merged in the crown. In the same prince, likewise, merged that of Meath, which, being

in another branch of the Lacy's, was divided into the eastern and western between two daughters. The former came by descent to the house of March, and so to Edward the Fourth. Strongbow had the grant of Leinster as a palatinate, which at length was divided into five distinct ones between his grand-daughters, who being married to English noblemen, took no care for the defence of the country, their titles, estates, and *Jura Regalia* were taken from them by act of parliament, under Henry the Eighth.

Kildare, being in the hands of the earl of that name, escaped for a little time, until he was attainted under the same king, where it ended ; for though his heir was restored to the title and estate by queen Mary, it was with an express exception of the palatinate. The kingdom of Cork, containing that county and the south of Kerry, was another palatinate, granted to Fitz Stephen and Cogan, who made partition between them ; and on Fitz Stephen's death without issue, his part escheated to the crown. Cogan's share should have gone to the Courceys and Carens, but they could never obtain the possession of it ; for the earl of Desmond got the estate by purchase from a Cogan who pretended a right, and held it ; so this share of the palatinate fell likewise into disuse. Desmond, indeed, had interest enough to get a new palatinate created for himself in the county of Kerry, called Desmond, which for repeated rebellions was justly forfeited to queen Elizabeth.

Edward the Third erected the palatinate of Tipperary in favor of the earl of Ormond, who was grandson to Edward the First, which continued in that family, with some interruptions, until the attainer

of the late duke in 1715. Thus by degrees the crown regained the power it had parted with, and was at length enabled, though with difficulty, to reduce the whole kingdom, which had been well nigh lost by means of such profuse grants.

Besides the temporal peers, there are spiritual ones, that is the bishops, and they have seats in parliament, which anciently many abbots also enjoyed. The original of this right was from the feudal customs. The priests of the Germans, while they continued pagans, were necessary attendants in their general assemblies, not only for advice, but the benefit of their prayers and divinations. When these nations embraced Christianity, they transferred the same veneration and honor to their new instructors and bishops; and sometimes other churchmen of eminence, though they held lands not by military tenure, but by what is called *free alms*, were, in every nation as well as England, members of the states of parliaments. But since the conquest they have begun to sit by another right, namely by their baronies; the conqueror having converted their estates in free alms into baronies, and to their great mortification, subjected them to military service*.

Upon this head several questions have been propounded, as how far they are lords of parliament, and whether the clergy are a third estate of the realm, and sit solely in that right. This is a question of some importance, because if they make a distinct estate, no law would be good to which the majority of them did not consent. Certain it is that in France, the clergy

*Coke on Littleton, lib. 2. § 135. Selden's tit. Hon. part 2. chap. 5. § 19.

made one estate, the nobility the second, the burghers the third; and in Sweden the peasants make the fourth, all sitting in distinct houses, the majority of each of which must concur. And therefore I do believe, that when, in England, we talk of *three estates*, the clergy, not the bishops alone, make one of them, contrary to the modern opinion, that the king is the first estate, and the bishops and the nobility the second; for the king is in no country reckoned one of the estates, but the head of all. However from this no argument can be drawn that the bishops should sit separately, or that a majority of them, as representing the clergy, should concur.

As to sitting separately, it is pretty clear that, by the old law, none were members of parliament, but the immediate military tenants of the king, and that they sat all in one house, however their titles and fortune might differ; being all equal as to rank, with respect to the king, and all having the same rights. The division of parliament into two houses was never known in Scotland; who, in all probability, modelled their constitution from their neighbours; nor doth it appear in England previous to Edward the First, but arose, probably, from the great barons disdaining to sit, as equals with citizens and burgesses. For even, after this time, they did not disdain to associate with the knights of the shires, who represented the minor barons, and other military tenants, as appears by many instances. But for a number of centuries past the gentry, which were formerly considered as a lower noblesse, and are so abroad, have been melted into one body with the other commoners†.

† Robertson's hist. of Scotland, book 1. p. 68. *Essays on Brit. Antiq. Ess. 2.*

If then there was originally but one house, and if, since the division, the bishops have constantly sat in the house of peers, there can be no pretence for any privilege for them more than for the body of barons or earls. It is urged, likewise, that several valid acts of parliament were passed without any bishop present; but this happened only in distracted times; and, whoever might think it prudent or proper to absent themselves at a particular season, it will hardly be said to be a good parliament when they were not summoned; and if, at any time, they refused to attend, there was no reason why the public business should stop, as they sat, not as an independent constituent part of parliament, but each distinctly for himself, in right of his barony. From these occasional and general absences of theirs, an opinion grew up by degrees, and now is established law, that there is a material difference between bishops and lay lords, in respect to their nobility. In truth, that they are not peers to each other, and consequently that a bishop cannot sit in judgment on the life of a peer, neither is he to be tried by the peers, but by a jury of commoners.

It is worth while to see how these opinions grew up; for, from the original constitution, every bishop, being a baron by tenure, and having a fee simple therein, had certainly as great right as other barons; but the canon law having forbid any ecclesiastics being concerned in matters of blood, and they being obliged by the common law to attend judgments in parliament, were in a great strait between the two laws, how to act when a peer was capitally accused. They at length obtained from Henry the Second in the constitutions of Clarendon, the following allow-

ance : *Et sicut ceteri barones debent interesse judiciis curia, regis quousque perveniatur ad diminutionem membrorum, vel ad mortem* ; where the last words are plainly an exception in their favor, in derogation to the common law, on account of their peculiar circumstances under the canon. However, as many questions might arise before it came to the last vote, that might entirely influence the final determination, they used to absent themselves totally, and this going on for ages, and the feudal baronies wearing out, and all titles becoming fixed to the blood, not to the land, they came to be considered as peers of a different nature, because their blood did not succeed, and that which was first a favorable permission, was construed a prohibition ; and when this was once established, it followed necessarily, that, not being peers to the nobility by blood, they must be tried by commoners*.

With respect to the trials of noblemen, now I have said so much on that head, I shall observe, they were carried on in two different methods. Either the accused person was tried in parliament, and then all the temporal lords had voices, or he was tried by a jury of peers ; that is the king appointed twenty-four noblemen for that purpose : A law that has proved fatal to many noblemen, who happened to fall under the displeasure of the court. A commoner hath a right to prevent the sheriffs returning a jury to try him, if he can shew a just exception to the sheriff ; and after the return is made, he can challenge a certain number for causes known only to himself, and as

*Gibson, cod. jur. eccles. Angl. vol. 1. p. 143.

many more as he can prove sufficient matter of exception to. Such care did the law take of the lives of the commons, but no exception lay for a peer to the king's return. The law would not suppose the least partiality in him, even in his own cause; neither would it suspect that a peer could be biassed by any consideration from doing strict justice, and therefore no challenge lay against him for any cause, however strong and notorious; and the same confidence is the reason why they give their votes, guilty or not guilty, not upon their oaths, but upon their honors.

I can scarce imagine that this method of trial could have prevailed in the times of the great power of the barons, when they often made the crown to totter; neither have I been able to discover its beginning. Certain it is that in the reigns of the Plantagenets most, if not all noblemen, were tried in full parliament; and as certain it is, that, during the reigns of the Tudors and Stuarts, the other was universally followed; insomuch that every nobleman was sure either to suffer or escape, according as the court was at that time affected towards him. At length, after many struggles, about 1695, the bill for regulating trials for high treason and misprision of treason was passed; one clause of which provides, that on the trial of peers, every lord who hath a right to vote in parliament, shall be summoned, and have a right to vote. Thus was the inconvenience attending the king's naming the jury remedied; but the law in the other point stands as before, that no peer can be challenged. According to this law have all trials of Irish peers proceeded since that time, though

there is no act for that purpose in this kingdom*.

*Privileges of the baronage, by Selden, ch. 2. p. 1537 of the edition of his works by Wilkins. Coke's institute, second part, p. 49 and 50; third part, p. 26.....31.

 LECTURE XXII.

The share of the Commons in the Legislature....The Armigeri or Gentry....Knights Bannerets....The nature of Knighthood altered in the reign of James I....Knights Baronets....Citizens and Burghers....The advancement of the power and reputation of the Commons.

HAVING given a general idea of the lords, and their share of the legislature, it will now be proper to descend, and see the several classes of the lower rank, called *Commons*, and to examine what share or influence they had formerly, or now enjoy, in the government. The commoners may, in general, then, be divided into the *lesser nobility* or *gentry*, and the others, whom, for distinction sake, I shall call the *lower commons*. For although, since the reign of Henry the Eighth, many men of the best families, and some descended from the nobility, have engaged in commerce, and thereby brought lustré to that order of men, before that time all persons engaged in trade were held in as much contempt by the gentry of England, as they are at present, by those of any nation ; and a gentleman who employed himself in hunting, or perhaps serving the king, or some great lord, was looked upon to have degraded himself.

The gentry were called *Armigeri*, because they fought on horseback, in complete armor, covered from head to foot ; whereas the infantry's defensive

arms were of a slighter kind, and no complete covering. But we are not to imagine that all who fought on horseback completely armed, were gentry; for, in order to complete their squadrons, men of the lower ranks, who by their strength of body, and military skill, were capable of service, were admitted, but this did not make them gentlemen. Hence, in our old histories, we find the *knights and esquires*, that is, the real gentry, carefully distinguished from the *men at arms*. The peculiar privilege of the gentry was the bearing on their shields certain marks, to distinguish them from each other, and the men at arms called *Coats of Arms*. At first they were personal privileges, and not inherent in the blood, and the marks and rewards of some personal act of bravery performed by the bearer; so we find in the romances, that a new knight was to wear plain white, until, by some exploit he merited a mark. The general opinion is, that they were first introduced at the time of the crusades, which I believe is pretty just, at least with respect to our country: for the imperial crown of England had no arms before the conquest. The Norman kings bore the arms of Normandy, *two leopards passant*, to which Richard the First added that of Guienne, another leopard passant, and so composed this English coat, in which, among other alterations, the leopards have since been changed to lions*.

For the further encouragement of valor, these marks became transmissible to heirs, not to the eldest son only, as lands, but to all the sons; saving that the younger were to take some addition, for distinction sake. While these coats were granted by the king alone, and that for real service done, and

*Spelman, voc. Armiger. Du Cange, voc. Armigeri.

consequently were not too common ; and while the custom of wearing complete armor remained, and the office of high constable (the judge in such matters) continued, the gentry were very curious in preserving these distinctions, and vindicating them from usurpation. But as the military disposition of our gentry hath greatly subsided since the loss of the provinces in France, and the kings at arms have assumed the power of giving coats, nicety in these respects hath long since expired ; and now, as in a commercial country, especially, it should be, education and behavior are sufficient criterions of a gentleman.

I shall therefore say no more of them, as distinguished from the rest of the commonalty, but observe, that of these there are two ranks, *knights* and *esquires*, or gentlemen. For though we now make a distinction between these two last, the old law knew none, nor is it now a misnomer, in a writ of pleadings, to stile an esquire a gentleman, or the contrary. The holding of a knight's fee did not make a man of that order, but there were particular ceremonies required for the purpose. For the original design of the institution of *dubbing knights*, was that, after a person had, by performing military exercises, shewn that he had properly accomplished himself, and was capable of that honorable service in the field, in his proper person, he should, by a public solemnity, be openly declared so. No wonder, then, that the highest nobility, the sons of kings, nay kings themselves, thought this title an addition to their dignity, as it was then an infallible proof, that they had not degenerated from the virtue of their ancestors*.

*Selden, tit. hon. part. 2 ch. 5. § 33. Camden's introd. to his Britan. p. 242.

But among knights there were some of a more distinguished kind (I do not mean to speak of particular orders, such as those of the garter and others) called *Bannerets*, as knights in general were made, upon their proving themselves by exercises capable of service. These were never made but for an actual exploit in war, and then were dubbed with great solemnity under the royal banner. Their distinction was bearing a little banner, annexed to the wooden part of their lance, adjoining the iron point; as, originally, every man who had a whole knight's fee, or the amount thereof in parts of fees, was obliged to serve in person, and was not allowed a proxy, but in cases of necessity every such person was obliged to appear upon the king's summons, to shew himself qualified, and to receive the order of knighthood. This power continued in the king, even after the military tenants were discharged of personal attendance on sending another, or paying escuage, and came to be considered as a profitable fruit of the king's seignory, and was frequently used as an expedient to raise money, by obliging the unqualified, or those who had no mind to the expence or fatigue of attending, to compound †.

This right of composition was established by act of parliament, the first of Edward the Second, which likewise fixes the estate the persons summoned must have at twenty pounds a year, the quantity of a knight's fee; twenty pounds a year was indeed the valuation of a knight's fee at the time of the conquest, but by change of times, in Edward the Second's reign, it may well be esteemed forty; so that by this act a man

†Selden tit. hon. part 2. ch. 5. § 89.

who had half a knight's fee was liable to be summoned. This was one of the unhappy means made use of by king Charles the First to procure money when he quarrelled with his parliament. He was sensible, indeed, of a difference in the value of money, and therefore summoned none but such as had forty pounds a-year; but had he paid due attention to its real rise, he should have summoned none under an hundred and twenty. For in Edward's reign a pound in money was a real pound in silver, whereas in Charles's, it was but a third part, and so the proportion was to sixty pound sterling, and sixty more is the least rise that can be allowed for the improvements in the value of lands, by the intermediate increase of commerce. No wonder, therefore, that his people looked upon it as an unsupportable grievance. Accordingly, in the 17th of his reign, the act of Edward the Second was repealed, and in Ireland, it vanished with the tenures on which it depended†.

The great change in the tenure of knighthood happened in the reign of James the First. The Plantagenets never created any persons such but with a view to military merit, except their judges. The Tudors extended it to persons who had served them well in civil stations, but so sparingly, and to persons of such evident merit, that it still was an encouragement to those that deserved well of the public. But James, who had a passion for creating honors, poured forth his knighthoods, without regard to desert, with so lavish an hand, confirming them for money frequently on wealthy traders, and others without any appar-

†Spelm. reliq. dissert. de milite. Coke's inst. part 2. p. 593.

ent public merit, that thereby, as also by creating an order of hereditary knights, called *baronets*, a knight-hood soon lost the badge of merit it before had carried.

The occasion of creating baronets was this. On the escheat of the six counties in Ulster, they were planted with colonies of Scotch and English ; and as it was necessary to support a standing army there for some years after, for the defence of the infant settlements, and money was wanting for that purpose, as in that reign, it always was for every other, this scheme of creating an order of hereditary knights, to take place after the barons, was fixed upon for that purpose. At first it had some aspect towards military service, for each of them was obliged to maintain so many soldiers in the plantation, for a limited time ; and to make the honor more valuable, and to get the better terms for it in the first plan, it was provided, that no more than two hundred should be originally created ; and when any of them failed, no new ones to be created in their room. But it was soon seen that these new knights, when they had once attained their dignities, might not duly perform the services they engaged for. The maintaining the soldiers, therefore, was commuted into a sum paid to the king, who undertook to do it ; and had he been a good œconomist, it would have been a prudent precaution ; but whatever sums he could lay his hands on were always at the mercy of his reigning favorite. He was, therefore, obliged to depart from his intended limitation, and to exceed his number ; and yet, after all, the service was not done so well as it should have been. His successors have followed his example, in

adding to the number, which now is certainly unlimited*.

Next to the gentry, or military order, in estimation among the northern nations stood the *citizens* and *burghers*, that is, the trading part of the nation, whether merchants or artificers. These were for some ages held in a very low light, none of the conquerors or their descendants applying themselves to such occupations. They were, indeed, at first allowed certain privileges and enjoyed their own laws, under the inspection of magistrates appointed by the king, known by the name of *Præpositi*, *Provosts*, or some other equivalent title. But these liberties did not last long. The turbulent temper of the times, the frequent competitions for the throne, and the many rebellions of the great lords, occasioned the towns and their inhabitants to be taken in war, one after another; and the persons so taken, were, by the prevailing *Jus Gentium* of these ages reduced to servitude; not, however, to a condition so low as the *villeins*, who were, properly, the slaves of those people, and had no property, but at the will of their lords. However it is, no state, except one absolutely barbarous, could subsist without artizans; and as commerce is the parent of wealth, and as neither it, nor arts, could thrive where property is not, in some sort, secure, the lords were in some degree, by their own interest, obliged to relinquish to these people the seizing of their goods at pleasure, as they practised towards their villeins, and to leave them at liberty to make regulations among themselves for the benefit of trade†.

*Selden, tit. hon. part 2. ch. 5. § 46. Cotton's posthumous works.

†Madox, Firma Burgi, ch. 1.

Thus far, then, they were free, but their servitude consisted in their being liable to taxes, or *taillages*, at the will of the lords, who, if they were wise, laid on such only as they could well bear; but miserable was their condition when they fell into the hands of one who was needy and rapacious; for, then, they were often fleeced, even to ruin and depopulation. This induced the wiser lords, who saw the consequences, and how much the arbitrary exertion of such powers must, in the end, hurt themselves, to restrain their own powers; and, by degrees, by granting them *charters*, to emancipate them. They formed them into *bodies corporate*, confirmed the right of making *bye-laws*, which had been permitted them, and granted them other privileges, or *franchises*, as they called them, from their being infranchised, in derogation to former regal or seignoral rights. But for their total freedom they were indebted to parliament, which, seeing the bad use king John made of his right in this kind, provided thus in Magna Charta: *Civitas London habeat omnes libertates suas antiquas, et consuetudines suas. Præterea volumus & concedimus, quod omnes aliæ civitates, burgi, & villæ, & barones de quinque portibus, & omnes alii portus, habeant omnes libertates & liberas consuetudines suas.* And another chapter restrains the king from laying new and evil tolls, and confines him to the ancient customs*.

Hitherto, however, the citizens and burgesses were no part of the body politic, and were not represented in parliament. But as, with their security, their wealth and consequence increased, about, or before the year 1300, they were admitted to that privilege;

*Madox, *Firma Burgi*, ch. 2. Ruffhead, vol. 1. p. 4.

that they might, in conjunction with the knights of the shires, be a check on the overgrown power of the mighty lords ; and about that time also the same privilege was allowed to this class of people in the other nations of Europe also. This right was confirmed, and so I may say, the *house of commons*, in its present condition, formed by the statute of the thirty-fourth of Edward the First. *Nullum tallagium vel auxilium, per nos vel heredes nostros, in regno nostro ponatur, seu levetur, sine voluntate & assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, & aliorum liberorum communium de regno nostro* ; where we see, not only the burgesses, but free yeomen also had representatives, namely, by their voting along with the knights of the shires, according to the maxim of that wise prince, *Quæ ad omnes pertinent, ab omnibus debent tractari**.

Having come to the constitution of the house of commons as it stands at present, it will not be amiss to look back, and see how far its present form agrees with, or differs from the feudal principles. These principles, we have seen, were principles of liberty ; but not of liberty to the whole nation, nor even to the conquerors ; I mean, as to the point I am now upon, of having a share in the legislation. That was reserved to the military tenants, and to such of them only as held immediately of the king. And the lowest and poorest of these also, finding it too burthensome to attend these parliaments, or assemblies, that were held so frequently, soon, by disuse, lost their privileges ; so that the whole legislature centered in the king, and his rich immediate tenants, of his baro-

*Ruff head, vol. 1. p. 156!

ny. And it is no wonder the times were tempestuous, when there was no mediator, to balance between two so great contending powers, and were it not that the clergy, who, though sitting as barons, were in some degree a separate body, and had a peculiar interest of their own, performed that office, sometimes, by throwing themselves into the lighter scale, the government must soon have ended either in a despotical monarchy, or tyrannical oligarchy.

Such were the general assemblies abroad in the feudal countries, but such were not strictly the *wittenagemots* of the Saxons, for their constitution was not exactly feudal. I have observed that most of their lands were allodial, and very little held by tenure. The reason I take to be this: On their settlement in Britain they extirpated, or drove out, the old inhabitants, and therefore, being in no danger from them, they were under no necessity of forming a constitution completely military. But then those allodial proprietors being equally freemen, and equal adventurers with those who had lands given them by tenure, if any in truth had such, they could not be deprived of their old German rights, of sitting in the public assemblies. From the old historians, who call these meetings *infinita multitudo*, it appears that they sat in person, not by representation*.

This constitution, however, vanished with the conquest, when all the lands became feudal, and none but the immediate military tenants were admitted. We find, indeed, in the fourth year of William the First, twelve men summoned from every county, and Sir

*Gurdon's history of Parliament. Tyrrel's introduction to his history. L. L. Anglo Saxon, ap. Wilkins.

Matthew Hale will have this to be as effectual a parliament as any in England* ; but, with deference to so great an authority, I apprehend that these were not members of the legislature, but only assistants to that body. For if they were part thereof, how came they afterwards to be discontinued till Henry the Third's time, where we first find any account of the commons ? The truth seems to be, that they were summoned on a particular occasion, and for a purpose that none but they could answer. On his coronation he had sworn to govern by Edward the Confessor's laws, which had been some of them reduced into writing, but the greater part were the immemorial custom of the realm ; and he having distributed his confiscations, which were almost the whole of England, into his followers' hands, who were foreigners, and strangers to what these laws and customs were, it was necessary to have them ascertained ; and for this purpose, he summoned these twelve Saxons from every county, to inform him and his lords what the ancient laws were. And that they were not legislators, I think appears from this, that when William wanted to revive the Danish laws, which had been abolished by the Confessor, as coming nearer to his own Norman laws, they prevailed against him, not by refusing their consent, but by tears and prayers, and adjurations, by the soul of Edward his benefactor.

Thus William's laws were no other than the Confessor's, except that by one new one, he dextrously, by general words, unperceived by the English, because couched in terms of the foreign feudal law, turned all the allodial lands, which had remained unfor-

*History of the common law of England, p. 107.

feited in the proprietor's hands, into military tenures. From that time, until the latter end of Henry the Third's reign, our parliaments bore the exact face of those on the continent in that age ; but then, in order to do some justice to the lesser barons, and the lower military tenants, who were entitled by the principles of the constitution to be present, but disabled by indigence to be so in person, they were allowed to appear by representation, as were the boroughs about the same time, or soon after. The persons entitled to vote in these elections for knights of the shire, were, in my apprehension, only the minor barons, and tenants by knight service, for they were the only persons that had been omitted, and had a right before, or perhaps with them, the king's immediate socage tenants *in capite*.

But certain it is, the law that settled this had soon, with regard to liberty, a great and favourable extension, by which all freemen, whether holding of the king mediately or immediately, by military tenure or otherwise, were admitted equally to vote ; and none were excluded from that privilege, except villeins, copy-holders, and tenants in ancient demesne. That so great a deviation from the feudal principles of government happened in so short a time, can only be accounted for by conjecture. For records, or history, do not inform us. I shall guess then, that the great barons, who, at the end of Henry the Third's reign, had been subject to forfeiture, and obliged to submit, and accept of mercy, were duly sensible of the design the king had in introducing this new body of legislators, and sensible that it was aimed against them, could not oppose it. But, however, they attempted, and for some time succeeded to eulde the effects of

it, by insisting that all freemen, whether they held of the king, or of any other lord, should be equally admitted to the right of the representation.

The king, whose profession was to be a patron of liberty, Edward the First could not oppose this ; and as he was a prince of great wisdom and foresight, I think it is not irrational to suppose, that he might be pleased to see even the vassals of his lords, act in some sort independently of them, and look immediately to the king their lord's lord. The effect was certainly this, by the power and influence their great fortunes gave them in the country, the majority of the commons were, for a long time, more in the dominion of the lords than of the crown ; though, if the king was either a wise or a good prince, they were even then a considerable check upon the too mighty peers.

Every day, and by insensible steps, their house advanced in reputation and privileges and power ; but since Henry the Seventh's time, the progress has been very great. The increase of commerce gave the commons ability to purchase ; the extravagance of the lords gave them a power to alienate their entailed estates ; insomuch that, as the share of property which the commons have is so disproportionate to that of the king and nobles, and that power is said to follow property, the opinion of many is, that, in our present situation, our government leans too much to the popular side ; while others, though they admit it is so in appearance, reflecting what a number of the house of commons are returned by indigent boroughs, who are wholly in the power of a few great men, think the weight of the government is rather oligarchal*.

*Biblioth. polit. dial. 6, 7, 8. Hume, vol. 1.

LECTURE XXIII.

The privilege of voting for Knights of the Shire....The business of the different branches of the Legislature, distinct and separate....The method of passing laws....The history and form of the legislature in Ireland.

THE house of commons growing daily in consequence, and the socage tenants having got the same privilege of voting for the knights of the shire as the military ones, it naturally followed, that every free person was ambitious of tendering his vote, and thereby of claiming a share in the legislature of his country. The number of persons, many of them indigent, resorting to such elections, introduced many inconveniences, which are taken notice of, and remedied by the statute of the eighth of Henry the sixth chapter the seventh which recites, that of late “ elections of knights had been made by very great, outrageous, and excessive numbers of people of which the most part was of people of small substance, and of no value, whereof every one of them pretended a voice equivalent with the most worthy knights and esquires, whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people of the same counties shall very likely rise and be, unless convenient and due remedy be provided in this behalf ;” and then it provides that, “ no per-

“sons should have votes, but such as have lands or tenements to the value of forty shillings a year above all charges.” And so the law stands at this day, though by the change in the value of money, by the spirit of this statute, no person should have a vote that could not dispend ten pounds a year at least. Such a regulation, were it now to be made, would, certainly, be of great advantage both to the representers and represented ; but there is little prospect of its ever taking place : And if it should be proposed, it would be looked upon as an innovation, though in truth, it would be only returning to the original principles of the constitution*.

Our legislature, then, consisting of three distinct parts, the king, lords, and commons, in process of time, each of them grew up to have distinct privileges, as to the beginning particular businesses. Thus all acts of general grace and pardon take their rise from the king ; acts relative to the lords and matters of dignity, in that house ; and the granting of money in the commons. How the commons came by this exclusive right, as to money matters, is not so easy to determine. Certain it is that, originally, the lords frequently taxed themselves, as did the commons the commonalty, without any communication with each other ; but afterwards, when it was judged better to lay on general taxes, that should equally affect the whole nation, these generally took their rise in that house which represented the bulk of the people ; and this, by steadiness and perseverance, they have arrogated so far into a right peculiar to themselves, as not to allow the lords a power to change the least

* Ruffhead, vol. 1. p. 544.

title in a money bill. As to laws that relate not to these peculiar privileges, they now take their rise indifferently either in the lords or commons, and when framed into a bill, and approved by both, are presented to the king for his assent; and this has been the practice for these two or three hundred years past*.

But the ancient method of passing laws was different, and was not only more respectful to, but left more power in the crown. The house which thought a new law expedient, drew up a petition to the king, setting forth the mischief, and praying that it might be redressed by such or such a remedy. When both houses had agreed to the petition, it was entered on the parliament-roll, and presented to the king, who gave such answer as he thought proper, either consenting in the whole, by saying, *let it be as is desired*, or accepting part and refusing or passing by the rest, or refusing the whole by saying, *let the ancient laws be observed*, or in a gentler tone, *the king will deliberate*. And after his answer was entered on the roll, the judges met, and on consideration of the petition and answer, drew up the act, which was sent to be proclaimed in the several counties†.

Lord Coke very justly observes that these acts drawn up by men, masters of the law, were generally exceedingly well penned, short, and pithy, striking at the root of the grievance, and introducing no new ones; whereas the long and ill penned statutes of later days, drawn up in the houses, have given occa-

* Spelman, voc. Parliamentum. Hales on Parliaments. Ellys on Temporal Liberty.

† Elsringe, on the method of passing bills in Parliament. Gardon's hist. of Parliament.

sion to multitudes of doubts and suits, and often, in stopping one hole, have opened two. However, notwithstanding this inconvenience, there was good cause for the alteration of method. The judges, if at the devotion of the court, would sometimes, make the most beneficial laws elusory, by inserting a salvo to the prerogative, though there was none in the king's answer; whereas, by following the present course, the subjects have reduced the king to his bare affirmative or negative, and he has lost that privilege, by the disuse of petitions, of accepting that part which was beneficial to himself, and denying the remainder†.

I have the rather mentioned this ancient practice of making laws, because it shews how inconsistent with our constitution is that republican notion, which was broached by the enemies of Charles the First, that the king, by his coronation oath, swearing to observe the laws *quos vulgus elegerit*, was obliged to pass all bills presented to him, and had no negative. The meaning, certainly, only extended to his observation of the laws in being. For if the words were to be construed of future propositions, and in the sense that those people would put upon them, the lords also, as well as the king, must be deprived of their power of dissent, and so indeed, it appears, they expounded it; for when the lords offended them, by refusing the trial of the king, they consistently enough with the maxim they had established, turned them out of doors.

But though such as I have mentioned is the constitution of the English parliament, the form of the †Ruffhead's preface to the statutes.

legislature in this kingdom hath been for above two hundred and sixty years very different, the nature of which, and the causes of its deviation from its model, it is proper every gentleman of this country should be acquainted with. In the infancy of the English government in Ireland, the chief governors were generally chosen by the king out of the lords of the pale, the descendants of the first conquerors, both as they were better acquainted with the interest, and more concerned in the preservation of the colony, and also as, by their great possessions, they were better enabled to support the dignity of the place, whose appointments, the king's revenue here being inconsiderable, were very low. These governors, however, though men of the greatest abilities, and of equal faithfulness to the crown, were not able to preserve the footing the English had got soon after the conquest ; but were every day losing ground to the natives, down to the reign of Edward the Third, which is generally, and, I believe, justly, attributed to the negligence of the English lords, who, by intermarriages, had acquired great estates in Ireland. The power of these lord lieutenants was, in one respect, likewise exorbitant, namely, in giving consent to laws without ever consulting his majesty, a power, perhaps, necessary at first, when the country was in a perpetual state of war, and its interest would not brook delays, but certainly, both for the sake of king and people, not fit to be continued.

It was natural, therefore, for the king, who found himself ill served, to change hands, and to entrust this exorbitant power with persons not estated in the country, and whose attachment he could confide in ;

and accordingly, from that time, we find natives of England generally appointed to the government, to the great discontent of the Irish lords, who looked upon themselves as injured by the ancient practice not being continued. This discontent was farther inflamed by a very extraordinary step, which this otherwise wise and just king was prevailed upon to take, and which first gave rise to that famous distinction between the English by blood, and the English by birth. This king, and his father Edward the Second, had granted great estates, and extensive jurisdictions to many Irish lords of English blood, for services pretended to have been done, many of which, it is probable enough, as the king alledged, were obtained by deceit and false representation ; and had he contented himself with proceeding in a legal course, by calling these patents in by *scire facias*, and vacating them upon proof of the deceit, no person could have complained ; but he took a very different method, as appears from the writ he thought proper to issue on that occasion. *Quia plures excessivæ donationes terrarum, tenementorum & libertatum, in terra Hiberniæ, ad minus veracem & subdolum suggestionem petentium, tam per Edward II. quam per regem nunc factæ sunt, rex dehsorias hujusmodi machinationes volens elidere, de consilio peritarum sibi assistentium, omnes donationes terrarum, tenementorum, & libertatum prædictarum duxit revocandas, quousque de meritis personarum, de causis & conditionibus donationum prædictarum fuerit informatus, & ideo, mandatum est justiciariis regni Hiberniæ, quod omnia terras tenementa & libertates prædicta per dictos regis justiciarios aut locum tenentes suos quibuscunque personis factæ scire facias.*

This hasty step alienated the English Irish from the king and his advisers, and though, after a contest of eleven years, the king annulled this presumption, the jealousy continued on both sides, and the Irish of English blood, were too ready to follow the banners of any pretender to the crown of England.

In the reign of Henry the Sixth, that weak prince's ministers, jealous of the influence of Richard duke of York in England, and of his pretensions to the crown, constituted him governor of Ireland; than which they could not have done a thing more fatal to their master's family, or to the constitution of this kingdom, as it turned out in the sequel; for to induce him to accept it so eager were they to remove him from England, they armed him almost with regal powers. He was made lieutenant for ten years, had all the revenue, without account, besides an annual allowance from England; had power to farm the king's lands, to place and displace officers, and levy soldiers at his pleasure. The use the duke made of his commission was to strengthen his party, and make Ireland an asylum for such of them as should be oppressed in England; and for this purpose passed an act of parliament, reciting a prescription, that any person, for any cause, coming into the said land, had used to receive succor, tuition, supportation, and free liberty within the said land, during their abiding there, without any grievance, hurt, or molestation of any person, notwithstanding any writ, privy seal, great seal, letters missive under signet, or other commandment of the king, confirming the said prescription, and making it high treason in any person who should bring in such writs, and so forth, to attach or disturb any such person.

This act, together with the duke's popularity, and the great estate he had in this kingdom, attached the English Irish firmly to his family, insomuch that, in Henry the Seventh's reign, they crowned the impostor Lambert Simnel, and were afterwards ready to join Perkin Warbeck ; and by this act of the duke of York's they thought to exculpate themselves†. But when that king had trodden down all opposition, he took advantage of the precarious situation they were in, not only to have that act repealed, and to deprive his representatives there from passing laws *rege inconsulto*, but also to make such a change in the legislature, as would throw the principal weight into his and his successors hands ; and this was by the famous law of Poyning's*. By former laws a parliament was to be holden once a year, and the lords and commons, as in England, were the proposers. This act, intended to alter these points, gave occasion to many doubts ; and indeed, it seems calculated for the purpose of not disclosing its whole effect at once. Its principal purport, at first view, seeming to be intended to restrain the calling the parliament, except on such occasions as the lord lieutenant and council should see some good causes for it, that should be approved by the king. The words are, that " from the next parliament that shall be holden by the king's commandment and license, no parliament be holden hereafter in the said land, but at such season as the king's lieutenant and council there first do certify the

† Kennet's English Historians, vol. 2. p. 587, 606. Carte, vol. 2. p. 828. Hume, vol. 2. and 3.

* Lord Bacon's life of Henry VII. ap. Kennet, vol. 2. p. 612.

" king, under the great seal of that land, the causes
 " and considerations ; and all such acts as to them
 " seemeth should pass in the same parliament, and
 " such causes, considerations, and acts, affirmed by
 " the king and his council to be good and expedient
 " for that land, and his license thereupon, as well in
 " affirmation of the said causes and acts, as to
 " summon the said parliament under his great seal of
 " England had and obtained ; that done, a parliament
 " to be had and holden after the form and effect be-
 " fore rehearsed, and any parliament holden contrary
 " to be deemed void*."

The first and great effect of this act was, that it repealed the law for annual parliaments, and made the lord lieutenant and council, or the king who had the naming of them, with his council of England, the proposer to the two houses of the laws to pass, at least of those that should be so devised before the meeting of parliament. But the great doubt was, as there were no express words depriving the lords and commons of their former rights, whether, when the parliament was once met, they had not still the old right of beginning other bills, or whether they were not restrained to the acts so certified and returned. By the preambles of some acts, soon after made, expressing that they were made at the prayer of the commons in the present parliament assembled, one would be inclined to think that the commons, after the assembling the parliament, had proposed these laws. Certain it is, the latter opinion, supported by the ministers of the king and his lawyers, gained ground. For, in the twenty-eighth of Henry the Eighth's

*Irish statutes, vol. 1. p. 23. Coke, 4. instit. chap. 76.

reign, an act was made suspending Poyning's law with respect to all acts already passed, or to be passed in that parliament; the passing of which act was certainly a strong confirmation of what was before doubtful against the house of lords or commons in Ireland, whether they could bring in bills different from those transmitted by the council, since here they both consented to the suspension of the act to make valid the laws they had passed or should pass in that parliament, without that previous ceremony*.

But in the reign of Philip and Mary, by which time this opinion, before doubtful (for so it is mentioned in the act then made) was, however, to be maintained and strengthened, as it added power to the crown. The act we at present live under was made to prevent all doubts in the former, which was certainly framed in words calculated to create such doubts, to be extended in favor of the prerogative. This provides, that as many causes and considerations for acts not foreseen before, may happen during the sitting of the parliament, the lord lieutenant and council may certify them, and they should pass, if they should be agreed to by the lords and commons. But the great strokes in this new act were two, the first explanatory of part of the former in Henry the Seventh's reign, that is, that the king and council of England should have power to alter the acts transmitted by the council of Ireland; secondly, the enacting part, that no acts but such as so came over, under the great seal of England, should be enacted; which made it clear, that neither lords or commons in Ireland had a right to frame or propose bills to the

*Irish Statutes, p. 48.

crown, but that they must first be framed in the privy council of Ireland, afterwards consented to; or altered by the king, and the same council in England, and then appearing in the face of bills, be refused or accepted *in toto* by the lords and commons here*.

It is true, that both lords and commons have attempted, and gained an approach towards their ancient rights of beginning bills, not in that name, but under the name of *Heads of Bills*, to be transmitted by the council; but as the council are the first beginners of acts of parliament, they have assumed a power of modelling these also. The legislature of Ireland is, therefore, very complicated. First, the privy council of Ireland, who, though they may take the hint from the lords or commons, frame the bill, next the king and council of England, who have a power of alteration, and really make it a bill, unalterable, by sending it, under the great seal of England; then the two houses of lords and commons, who must agree in the whole, or reject the whole; and, if it passes all these, it is presented to the king for his assent; which indeed is but nominal, as it was before obtained.

*Irish Statutes, vol. 1. p. 143.

 LECTURE XXIV.

Villanage....The Servi in Germany, mentioned by Cæsar and Tacitus, the predecessors of the Socmen or socage tenants in the feudal monarchy....Villeins in gross and villeins belonging to the land of the Lord....The condition of villeins.... The different ways by which a man may become a villein.... The means by which villanage or its effects may be suspended.

I NOW proceed to the lowest class of people that were in a feudal kingdom, who indeed, were not any part at all of the body politic, namely *copyhold tenants, tenants in ancient demesne, and villeins*, on which I shall not much enlarge, as villanage is worn out both in England and Ireland; and though the two former are common in England, yet there are none such in this kingdom. I shall begin with *villanage*, though the lowest kind, as I apprehend the other two by the tacit consent of their lords, have for ages, from being villeins acquired the privileges that distinguished them from such.

In a former lecture I gave it as my opinion, that, while the nations of the north continued in Germany, there was no such order of men among them; but that the persons among those people who were called *servi* by Cæsar and Tacitus, were the predecessors of the *socmen* or *socage tenants* in the feudal monarchy; though they certainly had not all the privileges

the socmen acquired, and that after their settlements in their conquests, this rank was introduced, and formed out of their captives taken in war, in imitation of the Roman slaves. In this I am strongly supported by my lord Coke, who quotes Bracton, Fleta, and the Mirror, concerning their origin, to the following purpose : “ The condition of villeins who passed
“ from freedom into bondage in ancient time grew
“ by the constitution of nations, and not by law of nature ; in which time all things were common to all,
“ and by multiplication of people, and making proper
“ and private those things that were common, arose
“ battles. And then it was ordained by constitution
“ of nations (he means by the tacit consent of civilized
“ nations) that none should kill another, but that he
“ that was taken in battle should remain bond to his
“ taker for ever, and he to do with him, and all that
“ should come of him, his will and pleasure, as with
“ his beast or any other cattle, to give, or to sell, or
“ to kill. And after, it was ordained for the cruelty
“ of some lords, that none should kill them, and that
“ the life and members of them, as well as of freemen,
“ were in the hands and protection of kings, and that
“ he that killed his villein should have the same
“ judgment as if he had killed a freeman*.” This, it falls also to be observed, is the very account the Roman civil law gives of the original of servitude.

Villanage, therefore, was a state of servitude, erected for the purpose of doing the most ignoble, laborious, and servile offices to the lord, according to his will and pleasure, whensoever called upon ; such as the instances *Littleton* gives, of carrying and recarry.

*Coke on *Littleton*, lib. 2. chap. 11. § 172.

ing dung, and spreading it on his lord's land. *Bracton* thus defines it, *purum villenagium est, a quo presatur servitium incertum indeterminatum, ubi scire non poterit vespere quale servitium, fieri debet mane, viz. Ubi quis facere tenetur quicquid ei praeceptum fuerit.* So the most honorable service, the military one, was free, and its duties uncertain. The next in rank, the socage was free, and its duties certain. This, the lowest, was servile, and its duties uncertain*.

Of those villeins there were two kinds, villeins belonging to the person of the lord and his heirs, which our law calls *villeins in gross*, and *villeins belonging to the land of the lord*, and who, in consequence of the lands being aliened went over to the new acquirer, without any special grant. These were in the Roman law, called, *servi adscriptitii glebae*, that is, slaves annexed to the soil, and by our lawyers *villeins* regardent to a manor; for manors were, anciently, thus distributed. After the lord had reserved to himself a demesne contiguous to his castle, sufficient for the purpose of his house and his cattle, the remainder was generally divided into four parts; the first for settling such a number of military tenants as might always more than suffice to do the service due to the superior lord; the second for socage tenants, to plow the lord's demesne, or in lieu thereof, to render corn, cattle, or other things as stipulated by him; the third for villeins, for the purpose of carrying dung, felling timber, making inclosures, and other servile offices, as required by the lord at his pleasure; and the last share of land, was called the *waste*, or *common*, being generally woodland, and coarse pas-

*Bracton, lib. 4. cap. 28.

ture, the wood for the lord's hunting, for supplying him with timber at his pleasure, and the tenants with reasonable *estovers* as they are called, out of the woods, in those three articles, *housebote* for the support of their houses, *sloughbote*, for their utensils of husbandry, and *firebote*, for fuel; and the pasture for the cattle of all the tenants, military, socage, and villeins in common. This was the usual method of distribution, not however into equal parts, for the demesne and waste were generally much the largest, nor always into the same number of parts, for this varied according to the quantity and quality of the land, whether better or worse, and the military service reserved, whether lighter or heavier†.

From this distribution we may see that, in most manors, there was land which, having been originally set apart to the use of the villeins, was called villein-land, which retained its name, and was liable to the same name, and servile services, though it had come into the hands of freemen, who, consequently, though free, might hold lands in villenage, and be obliged to do the same uncertain services as a villein was. Few freemen however we may suppose, would submit to such uncertain burthens, and therefore when they took such lands, the lord generally reduced the service to a certainty, and this tenure, because of the low nature of the duties they performed, was also, though abusively, called *villenage*. But speaking with propriety, it was socage, the tenant being a freeman, and the services certain. Certainty of service being, as I have often mentioned, the grand character-

†Reliq. Spelm. 251. Barington on the statutes 270. et seq. Gurdon's hist. of Court-Baron and Court-Leet, p. 573.

istic that distinguished the socage tenure from the military above it, and from villenage below it.

Let us now see what kind of property this rank of people had in their persons, their lands and their chattels ; for from what has been already observed, some kind of property they must have had, or they could not have performed the services. And the first rule is, that, with respect to every person but his lord alone, a villein was perfectly a freeman. His life, his liberty, his property, were equally protected by the law, as those of any other person. He could acquire, he could alien property, he could be plaintiff in all kinds of actions whatsoever ; but if defendant he might plead his being a villein. As to his lord, his case was very different. His life, indeed, his liberty, his limbs, were under the protection of the king ; and if in these he was injured by his lord, the lord should be punished at the suit of the king, as in the case of any other subject, but not at his own suit. However, there was two excepted cases, where the law (for they most certainly punished the two detestable crimes of murder and rape) gave a villein actions against the lord, namely an *appeal*, that is an accusation in his own name of murder, where the lord had killed the villein's ancestor ; and appeal of rape, where the lord had ravished his *neif*, for so a bond woman, or female villein, or *neif*, is called in our law. And here if the lord was found guilty, the villein, or *neif*, were by that judgment manumized for ever. For it would have been a glaring absurdity, to have afterward trusted them in the power of the heir of that lord, whom they had hanged. Neither had a villein, with respect to his daughter, the same power of disposing her in mar-

riage without the lord's consent as he had of his son. And this distinction was founded upon solid reason, for the son of a villein, after his marriage, and his issue, continued in the same plight as he was in before, villeins to the lord ; but the daughter, by her marriage, passed into another family, and her issue were either to be freemen, if her husband was free, or villeins to the other lords, if her husband was such ; so that the lord had a very important interest in his seeing his villein's daughter married to another villein of his. This previous consent, however, wore out by degrees, and by the custom of particular places, a certain fine was all that the lord could claim for the marriage.

With respect to the lands the villein held from his lord, and also as to his chattels, or personal fortune, he was only tenant, or possessor at the will of the lord ; for he the lord might resume the one, or take possession of the other whenever he pleased ; but in the interim they were the villeins, and he might convert the profits of them to his own use, unless they were also in being and seized ; the seizure of them being what made the absolute property in the lord. And the case was the same with respect to purchases, or acquisition of lands or goods ; for before the seizure, or some other public act equivalent thereto, the villein might alien them as well as the goods he had held before at the will of the lord, and the alienation was good against the lord, and the reason of this was undeniable. For it would have put a total stop to all commerce both of goods and land, if every buyer was obliged, at his peril, to make enquiry, and to take notice whether the seller may not possibly, in truth, be a villein to some one of the many lords in the

kingdom ; and it would have been highly absurd to allow the lord to seize the lands, or goods in the hands of the purchaser, when he might seize the purchase money likewise in the hands of his villein, the seller ; I say it is the seizure, or some other public act equivalent thereto, that vests the property in the lord ; for, in all cases, an actual seizure was not possible. A few instances will clear up this †.

If the villein purchases lands in possession in fee simple, fee tail, life, or years, the lord should, if he had a mind to make them his, enter, and claim them ; or if, for fear of danger, he dare not enter, should come as nigh to the lands as he dare, and claim them there. And this was sufficient to vest the estate in the lord, according to the nature of the estate the villein had in it, and to defeat a future purchaser ; even though the lord should suffer the villein to continue in the possession. For the purchaser is obliged, at his peril, to take notice of all legal acts of notoriety, done respecting the lands he purchases. But if the villein purchases land not in possession, as suppose a remainder, or reversion, where there is a prior estate for life or lives, or in tail, in another person in being ; here the lord cannot enter, for that would be disseizing, and doing wrong to the immediate tenant of the freehold ; and if he waited till that estate was spent, and the remainder or reversion was to come into possession, the villein might have aliened them before, and so defeat his lord. He should, therefore, in such case, come to the land, and claim the reversion or remainder, as his villein's purchase. And this act presently is sufficient to vest them, the reversion or remainder in him, and to defeat a future

† Coke on Littleton, lib. 2. chap. 11

purchaser. So if a villein purchased an advowson, or presentation to a living, where the parson of the church is living, the lord cannot present, which is the proper act to gain possession of the advowson. For the church is full of an incumbent, but he shall come to the church, and claim the advowson as his villein's purchase ; and this vests the advowson in him, and will defeat a future alienation by his villein. In the same way with respect to goods ; the lord may either seize them, and retain them in his own hands, or may come to the place where they are, and openly claim them before the neighbors, and seize a part of them in the name of the whole goods his villein *hath* ; and this shall vest the property in him, though he leaves the possession still in his villein , and if he adds the words or *may have*, it vests the property of goods after acquired, though it is otherwise of lands.

From this power of the lord as to his villein's property, it appears the villein can bring no action relative to the property against him ; for all such actions, being either to recover the thing itself, or damages for the wrong done, in both cases, it would be useless, and improper. For, inasmuch as the lord had right to take, the taking could be no injury, and to give damages even for a personal injury would be absurd and nugatory, since the lord might immediately, as soon as recovered rightfully, retake them from his villein. Therefore Littleton says, " a villein cannot have an appeal of maim against his lord " that hath maimed him*." For, as the law then stood, *maim* was only punishable by fine and imprisonment, at the suit of the king, or by damages,

*Lib. 2. § 194.

in an appeal of maim, at the suit of the party. Neither could he have an appeal of robbery against him, though that offence, with respect to freemen, was capital ; for the lord having a right to take, could not be guilty of robbery. However, there was one excepted case, wherein the lord could not take things out of his own villein's hands and wherein the villein also might maintain an action against him ; but then, in this case, the villein acted not in his own right, but in that of another, *in autre droit*, as our law says, which was when a villein was made an executor. For here he acted not in his own right, but as representative of his testator, for the performance of whose will, and for no other purpose, he had allowed to him this possession against his lord, and this right of action against him.

Let us now see how many different ways a man might be a villein, how many ways the villenage, or its effects, may be suspended, and how many ways it might be totally destroyed.

Now a man might be a villein either by birth, or become such by his own act. With respect to birth, our law considers only the condition of the father, whether free or villein, contrary to the civil law, where the maxim is *partus sequitur ventrem*. Our rule seems more agreeable to natural reason, as the husband is master of the family, the head of the wife, and supposed, at least, the principal party in the production of the offspring. Yet the Roman law is not therefore to be charged with absurdity, it proceeding on a principal peculiar to itself, namely, that they allowed no matrimony but between free persons ; a cohabitation between two slaves, or between a slave

and a free person, was called *Contubernium*, not *Nuptiæ* nor *Matrimonium*; and to such a commerce their law did not give such continuance, or entire credit, as to presume the father to be certain. A free-woman who so far disgraced herself as to cohabit with a slave, they supposed equally guilty with others; and therefore as the father was uncertain, *in favorem libertatis*, they presumed him a freeman. And, on the contrary, though a freeman cohabited with a slave, that law gave no credit to her constancy, but rather supposed the issue begat by one of her own rank, another slave. But in England, if the father was free or slave, the issue was so; for our law admitting such marriages as good ones, upon the maxim, *whom God hath joined let no man sunder*, gave them an entire credit. What then shall we say was the case of *bastards*, where the father was entirely unknown, and who were *fili nullius*. Some old opinion in England indeed held, that if the mother was a neif, because she was certain, the issue should be a villein; but this doctrine was exploded, and it was settled that, as the child was, by our law, to follow the rank of his father, and who that was, was entirely uncertain, it should be universally presumed in favor of liberty, that the father was a freeman, whatever the mother was. A bastard, therefore, could not be a villein, but by his own act; and how a man could become so I shall next proceed to shew*.

There was then but one way for a freeman born to become a villein, I mean in the latter ages, when the practice of making slaves of captives taken in war went into disuse, and that was by his admission and

*Littleton, § 187, 188.

confession. For *volenti non fit injuria* is a maxim of all laws, and in the ancient times of confusion, it might be an advantage, at some times, to a poor freeman to put himself, even in this law manner, under the protection of a lord that was both powerful and humane. But so careful was the English law of liberty that it did not allow every confession or admission to conclude against a man's liberty, but such an one only as could not proceed from mistake, inadvertance, or constraint. The confession must be made in a court of record, and entered on record. Then indeed was it conclusive, for it is a maxim of our law, that there is no averring against a record, that is, charging it, or the contents thereof, with falsehood. For if that could be, property could never receive a final determination, nor a man be certain that the suit that he had obtained might not be renewed against him*.

But the law went farther in its precautions, and would not suffer any confession, even in a court of record, to destroy liberty. If a man came voluntarily into such a court, and made an extrajudicial confession, that is where there was no suit depending, and contested in that court, it could not bind him. The confession, to bind, must be made in such a court, and in a suit litigated there; so that there might be no room afterwards for pretending surprize, error, constraint, or terror. Thus, if a stranger brought any action against a man (for if the lord brings any action, except one kind only, against his villein, he the villein, is thereby manumized, as I shall observe hereafter) I say, if a stranger, A, brought an action

*Littleton, § 174.

against B, and B, to bar A, of his action, pleads on record, as he may, that he is villein to C, this confession shall bind him, and he shall be C's villein, though he was in truth a freeman; yea though A, in that very action, had replied that B was a freeman, and had even proved him such: And indeed this was but a just punishment, for his fraudulent attempt to deprive A of his action.

Again, if a lord, claiming a man to be his villein, bring the writ called *nativo habendo*, the proper one to prove this fact, that the defendant was his villein, and the defendant confesses himself judicially so to be, he and his issue are bound, though he was free before; or if the defendant, in such case, pleads he is a freeman, and the lord, to prove him his villein, produces the defendant's uncles, or cousins, who swear, that they and their ancestors, from time immemorial, or from time antecedent to the separation of family, have been villeins to that lord and his ancestors, whatever becomes of the original suit, they themselves thenceforwards are the lord's villeins; and though they were in truth free, it is but a just punishment, as I observed before, for the foul attempt of reducing their kinsman to slavery. However, as we must allow that every man is fond of his own and his posterity's liberty, we must accordingly believe that these instances of freemen becoming slaves voluntarily were very rare, and, that the majority of villeins were such as were so by birth. Before I leave this head, I should observe that, with respect to the issue of men becoming villeins by their own confession, the issue born after the confession alone were bond, as being so born, and that the children born before, re-

tained the liberty they had acquired by their birth.

Villenage could not only be totally destroyed by many means, but also might be suspended for a time, and afterwards revive. The suspension arose from some subsequent obligation the villein, or neif, happened to lie under, which the law considered, and favored more than the lord's right in his villein, or neif; therefore, if the king made a villein a knight, such a creation, being for the defence of, and to increase the military strength of the realm, and the person obliged to serve accordingly, his state of villenage was suspended, not destroyed. For, if he was afterwards degraded from his order, he became the lord's villein again, so if a villein became a monk professed, now was he obliged to live entirely in his monastery, and spend his time in prayers and other spiritual exercises, duties inconsistent with his service as a villein; and those being performed to God, were preferred to the interest of the lord; but if such monk was deraigned, that is, degraded from his order, and turned out of his monastery, he became a secular man again, and the lord's right revived. But if a villein is made a secular priest, he not being confined to a monastery, nor his whole time dedicated to the service of God, he is still a villein and obliged to attend his lord at all times, when the stated times or occasions of his new duty do not employ him. So if a neif marries a freeman, the right of the husband in his wife, as founded on the law of God and nature, is preferred to the lord's, though prior, which is founded only on the constitutions of nations: She, therefore, is privileged, and a free woman during the coverture; but if the husband dies, or a di-

voice happens, then is she a nief again. But it may be asked, shall the lord thus, without any fault of, or consent from him, be, by the act of others, deprived, even for a time, of his right in his villein, and the advantage thence arising? I answer, though the law, for the public good, suspended the villenage, it did not leave the lord without redress for the wrong done unto him. For, in the cases of profession and marriage, the lord shall have his action against, and recover the damages he may sustain, from the abbot who had admitted his villein a monk, or the husband who married his neif; but against the king who has knighted his villein, he cannot have an action, for, according to the principles of the feudal law, to bring an action against the king is a breach of fealty: it is charging him with injustice, and with breaking that mutual bond, whereby he is tied to his vassals as strictly as they are tied to him. But he shall not be without remedy. He shall have his action, and recover damages against those, who by their aid, advice, counsel, or recommendation, prevailed on the king to make his villein a knight. Coke mentions two cases more, wherein I cannot say so fully as he says, the *villenage itself* is suspended, as that the *effects* thereof are suspended, as to a certain place; and both these are in honor of the king, one is when a villein escapes from his lord, and has continued for a year and a day in the demesne of the king, doing service to him as his villein. The lord can neither seize him, nor even bring a writ of *natio habendo* against him while he continues in the royal demesne. The other is where a villein is made a

seeular priest in the king's chapel. The lord cannot seize him in presence of the king*.

We shall next have a more agreeable subject, and by considering the many ways the law of England hath contrived to destroy villenage, have the pleasure of observing its natural bent toward the equal liberty of mankind, and how it rejoiced to shake off the shackles of servitude, even in those days when it admitted it.

*Coke on Littleton, lib. 2. chap. 11.

 LECTURE XXV.

The methods invented to destroy villenage....The bent of the law of England towards liberty....Copyhold tenants....Tenants in ancient demesne.

RELATIVE to villenage, the following are the words of the ancient judge Fortescue, who wrote a treatise on the grounds of the English law, for the instruction of his pupil, the unfortunate son of the unfortunate king Henry the Sixth. *Ab homine, & pro vitio introducta est servitus; sed libertas a Deo hominis est indita naturæ. Quare ipsa ab homine sublata semper redire gliscit, ut facit omne quod libertate naturali privatur**. We are now to see how, and in how many ways, our law favors this natural propensity to liberty. And the first and plainest is a direct enfranchisement, or, as the Romans call it, *manumission*. This, in the ancient times, before writing was common, used to be done, as all their important acts, (for the better preserving them in memory) in great form. *Qui servum suum liberum facit, in ecclesia, vel mercato, vel comitatu, vel hundredo, (that is, the county court or hundred court) coram testibus, & palam faciat, et liberas ei vias, & portas conscribat apertas, & lanceam, & gladium, vel quæ liberorum arma in manibus ei ponat†*. But after the use of writ-

*Cap. 42.

†Wilkins, Leg. Anglosax.

ing became common, the method was by the lord's deed (mentioning him to be his villein, and expressly enfranchising him) sealed by the lord's seal, and attested by proper witnesses, as other deeds between freemen should be*.

Before I go farther, I should observe the favor of the English laws to liberty in that, by it all manumission, of what kind soever, was absolute and irrevocable. Once a freeman, and ever so; whereas by the civil law, a freedman was bound to many duties towards his patron. A relation between them still subsisted, and if he was guilty of ingratitude, that is, of any of the many offences their law marked as such, he was again to be reduced to slavery.

But besides this species of express enfranchisement, there were many implied ones. First, by the act of the lord alone, and others by construction of law, upon the act either of lord or villein. By the act of the lord alone, namely, if he had entered into any solemn certain contract with his villein, giving him thereby either a permanent right of property, or a power to bring an action against his lord. In such cases he was instantly manumized, without express words; for, otherwise, he could not have the benefit of the gift intended, and the lord's act, in such cases, should be construed most strongly against himself. As if the lord gives land to his villein and his heirs, or to him and the heirs of his body, or to him for life; immediately on the giving livery and seizin, which was, as I have often observed, what completed an estate of freehold, and made it irrevocable, the

*Formulare Anglicanum, tit. Grants and Manumissions of Villeins.

villein became free. Otherwise he could not enjoy the benefit of the grant, or protect it against his lord.

The same was the case if the lord gave him any certain property, as a bond for the payment of a sum of money, or a yearly annuity, or a lease of lands for years. The villein could not securely enjoy the benefit of the gift, without being able to bring an action against his lord, and consequently being free against him. Yea, though the annuity or lease of land was but for years, the manumission was absolute forever, and not suspended for the years only; which was different from the cases I put in my last lecture, of villenage being suspended by the act, not of the lord, but another person; but here where the lord himself, by his own act, set him free, though but for a time, he was free for ever. But if the lord gave his villein lands to hold at will; this being of the same nature with the proper holdings of villeins, and the lord having reserved in his own breast a power of ousting whenever he pleased, the villein gaining thereby no certain property, he continued in his former situation.

Secondly, a man may be enfranchised without express words, by construction of law, operating on the act either of the lord or villein. If a lord had a mind to dispossess his villein of lands, or of goods, he had a right to enter on the lands, or seize the goods without ceremony; but if, waving this right, he brought an action against him for them, or if he brought not any action personal against him, but the one of *Nati-vo Habendo*, the villein was enfranchised, whether the lord recovered or not, or whether he prosecuted the action or not. For when he omitted the easy remedy the law appointed, and brought his villein into

court to defend his right, he admitted him to be a person that could stand in judgment against him, and litigate with him; that is, to be a freeman. But it must be observed this enfranchisement did not commence immediately from the taking out the writ, which was the commencement of the action, but from the appearance of both plaintiff and defendant, and this for the benefit of the lord; for otherwise, as Coke observes, a stranger, by collusion with a villein, might take out an action against him in his lord's name. To which I may add, that the lord might have intended his action against a freeman of the same name with the villein, and the sheriff might have summoned the villein by mistake. In this case it was hard that the lord should suffer. He therefore might, when he saw the villein ready to appear, nonsuit himself, that is, decline appearing; and then the villein could not appear, and therefore was not enfranchised. But if he went on, and suffered his villein to appear, and consequently enabled him to plead against him, he must have abided by the consequences of his own folly, and his nonsuiting himself afterwards could in no sort avail him*.

A villein might likewise be manumitted by his lord's bringing a criminal action against him, though this was no admission of permanent property in him, or of his capacity of standing in law against him as a freeman; as if the lord brought an appeal of felony, as of murder, or robbery, against him. If he was

*Hickes. dissert. epist. p. 13. et seq. Brady's hist. p. 82. Fitzherbert's *natura brevium*, p. 187, 189, 190. Cowell's interpreter, voc. copiehold. Coke on Littleton, lib. 2. chap. 11.

acquitted he might be enfranchised, because he might be entitled to recover damages for the malicious prosecution, and the danger his life had been in ; and damages he could not recover without being a free-man. I say *might* be enfranchised, because he *might* recover damages. For in this case a distinction is to be taken, whether the villein was, before the appeal brought, indicted at the suit of the king for the same offence, or was not. If he was not, the acquittal shewed the prosecution to be malicious, and the villein was entitled to recover damages, and so to be free. But if he had been indicted, there were no grounds to suppose the appeal brought maliciously. The finding the indictment by the grand jury was a presumption of his guilt. The lord had a rational ground for bringing his appeal, and he had a right to bring it for the punishment of his villein, if guilty. Otherwise he could not have him hanged, for the indictment at the king's suit might not be prosecuted, or the king might pardon. In such case, therefore, there being no malice presumed, the law gave no damages, and consequently no enfranchisement. But the lord's bringing the writ called *Nativo habendo* against his villein, namely, claiming a man to be his, as such, was no enfranchisement, for that would defeat the ends of the suit ; and the law allowed the lord a power to seize his villein without further ceremony, it did not precisely compel him to that method only, for his villein might be at too remote a distance, or under the protection of persons too powerful. But if, after appearance, the lord suffered himself to be nonsuited, in this action, it was an enfranchisement.

The law, likewise, enfranchised in some cases on

the act of the villein himself, as if the lord had been found guilty in an appeal of murder, brought by his villein, or of rape by his neif ; but these I mentioned in the last lecture, and the reason is apparent.

By all these various ways the number of villeins insensibly diminished, and the number of freemen continued to increase in every reign ; but what gave the finishing stroke to servitude were the confusions occasioned by the two contending houses of York and Lancaster ; when the whole kingdom was divided, and every lord obliged, even for his own security, to take part with one side or the other ; and when once engaged, necessitated to support his party with his whole force. Villeins were, therefore, emancipated in prodigious numbers, in order to their becoming soldiers. Many of such, also, who had not been formerly emancipated, in those times of distraction, fled for self preservation to London, and other cities, where, being absent from their lords, they were looked upon as free ; and where they generally continued, even after these troubles had ceased, unknown to the heirs of the ancient lords ; and in consequence, for want of proof of their servitude within fifty years last past, (which was the time of limitation for this action) most of them and their posterity became free. When things afterwards became composed, under Henry the Seventh, many of these persons were by the heirs of their former lords reclaimed, and recovered as villeins, though, undoubtedly, the far greater part escaped undiscovered. But even in those actions that were brought, both judges and juries were very favorable to the persons claimed ; the juries out of favor to liberty, and the judges, I presume, fol-

lowing the policy of that reign, one of the great objects of which was the depression of the great lords ; to which nothing could more contribute than the lessening the number of the persons who were held in such strict dependance by them, and the profits of whose industry they had right to seize, to increase their wealth and their power †.

Another thing which had, long before that period lessened their numbers, was the rise of copyhold tenants. These are persons who are said to hold lands *at will, but according to the custom of a manor*, and those arose from the villenage tenants, as I conceive, by the following means. When a succession of mild and humane lords had neglected, for a long time, to seize their villeins goods, or to exact villein service, so that no memory remained of their having made use of such a practice, they came to be considered in another light, and became exempted from that seizure by prescription. For the lord claiming a villein in a *nativo habendo*, must plead, and prove, that he, or his ancestors, had exacted such services, from the person claimed, or his ancestors, otherwise he failed. Therefore, in the case I have mentioned, though a future lord had an inclination to depart from the practice of his predecessors, and revive his rights, he could not recover them for want of proof ; and these persons so long indulged, became freemen. However their lands, (they being only tenants at will) might still be resumed, until, at last they got, likewise, by the same kind of prescription, a permanent right in them also, in the way I now shall relate.

If a lord had given his villein any certain estate, it

†Carte, hist. of England, vol. 2. p. 844. 845. 846.

was, as I before observed, an absolute manumission for ever. But some lords, either in reward for services done, or out of bounty, gave many of those underling tenants, if not an absolute right to their holdings, at least, a fair claim and title to a permanent estate, which, in honor, the lord or his heirs could not defeat, and yet kept them in a particular kind of dependance, between freedom and absolute villenage. But the question was how this was to be done ; for if the lord had given him a deed, to assure him the lands, and so entered into a contract with him, he was entirely emancipated. The way was then for the lord to enter into the roll of his court, wherein he kept the list of his tenants, that he had given such an one an estate at will, to hold to him and his heirs, or to him and the heirs of his body, or to him for life or years ; and these directions being constantly complied with, grew by length of time into established rights, and they came to be called *tenants at will, according to the custom of the manor.*

They were still called tenants at will, because, they had been originally such, for they were never considered as, nor called, *freeholders*, until very lately, in one instance, they were admitted to vote for members of parliament, and their votes allowed by the house of commons. This decision was greatly exclaimed against by the tories, who were foiled by this reception, as proceeding from a spirit of party, and as being contrary to the rules of the ancient law, as it certainly was. But, on the other hand, it was agreeable to common reason and justice, and to the spirit and principles also, though not to the practice of the ancient constitution. For when Edward the First lays

down this maxim, *quæ ad omnes pertinent ab omnibus debent tractari*, what reason can be assigned why a copyholder for life, who has a valuable, and as certain estate, in fact, as a freeholder, though called by a different name, and who contributes equally to the taxes and expenses of the government, should not have equal privileges, and be equally intitled to be represented. They are called *copyholders*, from the evidence they had of their titles. The evidence that freemen had of their estates in land was either a *deed*, if the grant was by deed, or if it was without deed, the *livery and seizen*, attested by the witnesses present ; but the copyholder had no deed, neither was livery and seizen given to him, as he was originally but a tenant at will. His evidence, therefore, was a copy of the rule entered in the lord's court roll, which was his title, and from hence was he named copyholder*.

The peculiarities attending this kind of tenure, that distinguished it from other tenures, arose from their being considered as tenants at will. Hence arose that ancient opinion, that if a lord ousted his copyholder, he could have no remedy by action in the king's court against him : But had this been the law that since prevailed, all copyholders had been long since destroyed. Therefore, in Edward the Fourth's reign, it came to be settled, that if the lord turned out his copyholder, he might well maintain an action of ejectment against him, as a tenant for years could, or else might sue the lord in equity to be restored.

From the same principle of its having been an estate at will, arose the right of the lord to a fine, upon the change either of lord or tenant ; upon the change of

*Fitzherbert's *natura brevium*, p. 28. Kitchen on Courts,

the lord by the act of God only, that is by his death; upon the change of the tenant, either by the act of God, by his death; or by his own act, by his alienation. But the tenant paid no fine on the lord's alienation; for if he was so to do, he might be ruined by being frequently charged. These fines were an acknowledgment of the lord's ancient right of removing them, and were, in some places, by custom, fixed at a certain rate; in others, they were uncertain, and settled by the lord: However, he was not allowed to exact an unreasonable one, for if so, the tenancy would have been absolutely in his power, and of the reasonableness of the fine the judges of the king's courts were to determine.

I mentioned the alienation of copyholders, but to alien directly they could not, being esteemed but tenants at will, yet what they cannot directly do, they may indirectly, by observing certain forms; that is, by surrendering to the lord, to the use of such a person, and then the lord is, in equity, compellable to admit into the copyhold the person for whose use it is surrendered. These surrenders are either made in the manor court, or out of it. If made in court, it is immediately entered in the court roll; if out of court, it should be presented at the next court day, and then entered. The surrender out of court must be made to the lord himself, or to the steward of the manor, or it is not good; except in some particular manors by custom, where it may be surrendered to the lord's bailiff, or to two or more of the copyholders, who are to present it at court. When a surrender was made, the lord was only an instrument to hand it over, and therefore must admit that grantee

into such estate, and no other, whom the grantor had appointed in his surrender. In many cases a court of equity will supply the want of a surrender.

Copyholders could not devise their lands by will for two reasons. First, that, in general, lands were not devisable till the reign of Henry the Eighth; and for another reason peculiar to themselves, that, being called tenants at will, they were not looked upon to have a sure and permanent estate. But when, after the invention of *uses*, a way was found out to evade the general law, and to make lands go by will, by the owner granting his estate to another for the use of of himself, the grantor, for life, and after, for the use of such persons as he, the grantor, should name in his will; and when courts of equity were found disposed to oblige the grantee to perform the trust he had undertaken, in imitation hereof, copyhold estates began to be surrendered to the lord to the use of the copyholder's last will; and then the lord, after his death, was obliged to admit such person as he appointed in such his will, and in the mean time, the copyholder enjoyed during his life, for the surrender only did not transfer the estate, except it was to the lord's own use. If to any other use, the lord was but an instrument, and the land remained in the surrenderer until the admittance of the new tenant, which, in the case I have put, could not be till the old one was dead.

Another peculiarity arising from the same source, there being tenancies at will, was, that neither the husband could be tenant by the courtesy, nor the wife tenant in dower. The reason was, that every estate at will determined by the death of the tenant,

neither could an estate tail be created of a copyhold ; for the statutes *De Donis* extended not to them, and therefore, if a gift was made in such words as would at this day create such an estate, it would be in the nature of a *fee simple conditional* at common law. However, by special custom in particular manors, copyhold might be entailed ; might go to the tenant by the courtesy, and the wife might be endowed thereout*.

Thus much I have thought requisite to shew the general nature of this tenure, and of its origin..... More would be needless to say here, as there are no such in this kingdom, though the law relating to them makes a considerable part of the law of England.... For the same reason I shall be very short as to the tenants in ancient demesne.

Lands in *ancient demesne* are the estates that the king had, as king, to support his family, and other expenses, and were anciently unalienable. They were the lands of Edward the Confessor, and the Conqueror. But as the king could not make profit of them himself, they were given to tenants of two kinds, freeholders and copyholders. The law with respect to them stands as it does with other freeholders and copyholders, except that they have some peculiar privileges. The general reason of these privileges was, that the freeholders were originally socage, and the copyholders the villenage tenants of the king, and had these privileges granted to them because they were supposed constantly employed on the king's land, to furnish him with corn, cattle, and other necessaries ; and their privileges have continued,

*Coke on Littleton; lib. 1. chap. 8.

though the services have been changed into money, and the estates almost all alienated from the crown. These are principally as follow : They are exempted from all burthens and taxes laid on by parliament, unless they are specially named. They are not to be taxed for the wages of the knights of the shire. They are not to pay toll, or passage money for goods bought and sold in markets, for all things concerning husbandry and sustenance. They are not to be impleaded in any court, only in their manor court, nor to be summoned as jurymen, with some other privileges of the like nature, not necessary to be here insisted on.*

*Madox, Hist. of the Excheq. vol. 1. p. 295. Cowell's Interpreter, voc. Demaine. Spel. Gloss. voc. Dominicus.

 LECTURE XXVI.

The condition and state of laws in England during the Saxon times....The military policy of the Saxons not so perfect as that of the Franks....Their Kings elective....The division of the kingdom into shires, hundreds, and tithings....The administration of justice....The county court....The hundred court and court-leet....The court-baron....The curia regis....Method of trial in the Saxon courts....The ordeal....The waging of law....The trial by battle....Juries.

HAVING drawn a rough delineation of a feudal monarchy, and given a general account of the ranks of people of which it was composed, and of their distinct rights and privileges, it will next be proper, agreeably to what I first proposed, to observe, through the several reigns, the progress of English law, and by what steps and gradations it is come to differ so widely from what it was in its original; not, indeed, to go minutely through all the alterations made, for that would be a task that could not be confined within the compass of these lectures, but to point out the great and considerable changes, which had extensive influences, and contributed to give the law a new face. But, before I enter upon this, it will not be amiss to look back a little, and to say something with respect to the law in the Saxon times, since much of that remained after the conquest, and even makes a part of our law at this day.

The Saxons, being a German nation, brought into England the customs of that country, customs very similar to, and, in many instances, exactly the same with those used abroad on the continent. However, with respect to their military policy, it was not so strict and perfect as that of the Franks, occasioned, as I suppose, by their greater security from danger. For they had no reason to dread the Britons, having extirpated many, and expelled the rest, except a few whom they kept in the meanest offices, in the nature of villeins. Neither was the authority of their kings so great as abroad, for the founders of the kingdoms of the heptarchy were not kings in Germany, as the kings of the Franks and other nations had been, but only leaders of adventurers, who voluntarily associated themselves, and therefore could have no authority but what their followers confirmed upon them; and that it was not very considerable, appears from this, that every thing of great moment was transacted in their general assemblies or *wittenagemots*†.

These kings were elective, though generally those of the same family, (for to this also there were some exceptions) were elected. Offa says of himself to his people, *Electus ad libertatis vestrae tuitionem, non meis meritis, sed sola liberalitate vestra*. From the death of a former king to the election of a new one there was an *interregnum*, and even during these interregnums they made laws. For when the excellent king *Brithric* had been poisoned by his queen, they enacted a law, that if any future king should give his wife the title of queen, he should forfeit his dig-

† Bacon's discourse on the Laws and Government of England, part I. chap. 16.

nity, and his subjects should be free from their oaths of allegiance ; and then they proceeded to elect Egbert, Brithric's tenth cousin. And, in pursuance of this law, Ethelbald deposed his father, for giving that title to Judith of France. Alfred, indeed, was not chosen upon a vacancy, but claiming a part of the kingdom before the assembly at Swinburn, by virtue of an agreement with his brother Ethelred, that assembly annulled the agreement, as destructive to the nation, then threatened by the Danes, but enacted that Alfred should succeed to the whole, though Ethelred, and also their elder brother Ethelbert, left sons†.

I know it is generally said that these three brothers succeeded by their father's will, and so the Conqueror pretended a will of Edward the Confessor in his favor, but what had Ethelwulf to leave, but the little kingdom of Kent, which was assigned to him upon his deposition ? Besides, his will was, that they should succeed in case of issue failing, and they succeeded tho' there were sons ; and Alfred, who should know his own title best, acknowledged he had received his crown from the bounty of the princes, elders, and people. Here I shall mention, that the kings had no right to marry themselves without the consent of their people, for of Alfred it is observed, that he did so, *contra morem & statuta*, not only against custom but against positive laws. To go through no more particulars ; it appears from history that all the kings of the Saxon race were elected ; so were the Danes ; so was the last Harold, though not of royal blood, and though Edgar Atheling, who was

†Tyrel's general Introduction to his Hist. of England...
Hume, append. 1.

the lawful heir, had the kingdom been hereditary, was living; so was the Conqueror, and that was the just title he had. But enough of this point.

To see how justice was administered among the Saxons; the kingdom, for this purpose, was divided into *shires*, those into *hundreds*, or, as we call them in this kingdom (Ireland) *baronies*, and these into *tithings*, so called because they originally consisted of ten contiguous families, over which a *tithingman* presided. Every man in these tithings, was bound to keep the peace, not only for himself, but for the others of his tithing; and if one of them committed a crime, the rest were obliged to search him out, and produce him for trial, otherwise the tithing was grievously amerced. This division of the kingdom into *counties*, and their subdivisions, is generally ascribed to king Alfred. That the division of hundreds into tithings was his, is undoubted; and it is probable the division of counties into hundreds was his also; that the people, beggared by the Danish incursions, might have justice rendered to them nearer their own homes, without the expence, the fatigue, and even danger of travelling to the county town. But as to counties, they certainly were more ancient. Justice could not be administered, according to the principles of the German policy, in a country so large as one of the heptarchy, without its being subdivided; and accordingly, during those times, before the union of these kingdoms into one, we find, in the old laws, the mention of *shires* and *sheriffs*†.

† Spelm. Gloss voc. Comitatus, hundredus, & trithinga. Tyrrel's introduction to his hist. Carte's Hist. vol. 1. p. 210. Spelm. life of Alfred. Gurdon's Hist. of Court Baron and Court Leet.

But though Alfred was not the first maker of the divisions, we are not therefore to charge the writers that give that account with falsity. Even before his reign the Danes had made settlements in England, in the northern parts. In the very beginning of it they reduced him to content himself with the countries south of Bristol channel and Thames, with the addition of Essex, which, in their ravages, they had thrown into the greatest confusion. The rest of England was left as their prey, in which, after ravaging it several years, they fixed themselves, until, at length this great prince, to whom no king, I may say, no man whom history has recorded, was superior, either for piety to God, for a strict love of justice, for a fatherly affection to his people, for heroism in battle, for fortitude of mind (that never despaired in the lowest state of his affairs, when all seemed desperate) or for a wisdom capable of directing upon every occasion the proper measures to be taken by the state over which he presided; I say, until this great prince trampled his enemies under his feet, and obliged the Danes, who had so long looked upon him with contempt, to sue to become his subjects, and to receive the lands they had usurped, from him as their king and lord. For to expel them was impossible, and if it had been otherwise, and the matter had been effected, they had committed such massacres in the lands they possessed, that the country would have been desolate. Then, indeed, this king settled the limits of shires or counties, through all England; in Essex, and the counties south of the Thames, I presume, according to the old limits. For if we allow for one county being more woody, or having more

unprofitable land than another, they appear to bear no great disproportion to each other. But as to the lands the Danes held, it was different, for here, to win his new subjects, he was to accommodate the division somewhat to that which they had made among themselves, under their several leaders. Hence, in that part of England which was then Danish, we find the greatest difference between the size and value of the lands in the several counties, some excessively large, and others as exceedingly small; which, I think, is no way to be accounted for, in so wise a prince, but that the several tribes of these Danes were to be kept in their old bounds, and separate from each other. In such a succession of ages, undoubtedly, these boundaries have received alterations, but they could not have received such as would account for the disproportion; and in truth we find the Danes had divided the land before he conquered them.

In those counties and hundreds justice was administered to the inhabitants near their homes, without the delays and expences of resorting to Westminster. The court held by the sheriff, assisted by the bishop, was, in its origin, as we find in the red book of the exchequer, and had cognizance of four several matters that were handled, in this order. First, all offences against religion and the ecclesiastical jurisdiction were tried. The bishop, or his commissary, here was judge, and the sheriff was his assistant; and if the delinquent disregarded the censures of the church, he enforced the sentence by imprisonment. Next were tried temporal offences, that concerned the public, as felonies, breach of the peace, nuisances, and many others. Here the sheriff was judge, and the

bishop was assistant, to enforce the sentence with ecclesiastical censures. Thirdly, were tried civil actions, as titles to lands, and suit upon debt or contracts. Here the sheriff presided, but the *suitors of the court*, as they were called, that is the freeholders, were the judges, or as we now say, the *jury*, and the sheriff executed the judgment, assisted by the bishop, if need were. Lastly there was held an *inquest*, to see that every person above twelve years of age who was in some tithing, had taken the oath of allegiance, and found security to the king for his good demeanor. This was called the *view of frank pledge*, that is, the viewing that every person had nine freemen pledges or security for his loyalty to the king, and his peaceable behavior to his fellow subjects†.

But since the time of king Edgar, at least, this court has been divided into two, the criminal matters, both ecclesiastical and civil, and also the view of frank pledge was dispatched in one court called the *tourn*, that is, the *circuit*, from the bishop and sheriffs going circuit through the county; and the civil business was dispatched in another, called the *county court*. The law was, that the sheriff and bishop should twice in the year go their circuit or tourn, namely, in the month following Easter, and the month following Michaelmas; and should hold their court in every hundred of the county; but the view of frank pledge was to be taken only once a year, namely the tourn after Easter. But for the more ready dispatching civil causes, the county court was held once a month, that is in twen-

† Gurdon's hist. of Court Baron and Court Leet. Cowel's Interpreter, voc. Frankpledge. Bacon's Discourse on the Laws and Government of England, part. 1. chap. 23.

ty-eight *days*, reckoning a month by four weeks, and not by the calendar‡.

Out of these courts were others afterwards derived, for the more easy and expeditious way of distributing justice. Out of the sheriff's tourn, were two, the *hundred court*, and the *court leet*, and they had cognizance of the same matters the tourn had, and were erected independent of the sheriff's tourn, for the mutual ease of him and the inhabitants, where, in large counties, the hundred lay too remote to be conveniently visited in the circuit. But many inconveniencies arising from the sheriff's power not running into these separated jurisdictions, the hundred court, which was held by the steward of the hundred, were all, except a very few, that had been given in fee to some great men, reunited to the tourn and so they vanished in Edward the Third's reign‡.

The leet was of the same nature as the hundred court, derived out of the tourn, and made a separate jurisdiction; but it was held in the name of a subject, by the lord of the manor's steward; and to the lord belonged the profits of the courts leet. They were, however, though held by a subject, in his own name, esteemed as the king's courts, and allowed to be courts of record, as well as the tourn from which they sprung.

Out of the county court, which was for private causes, was derived the *court baron*. It was held from three weeks to three weeks, as all courts were in the early Saxon times. It was when a manor was

‡Bacon, chap. 24.

† Bacon's Discourse on the Laws and Government of England, chap. 25, 26.

exempted from the sheriff's county court, and the jurisdiction granted to the lord, to hold plea of civil suits. In this the suitors were the judges, as in the county court‡.

In these several courts was justice administered in the Saxon times, and even for a considerable time after the conquest, for the most part. But soon after that time inconveniencies were found, partly from the partiality of the judges in these inferior courts, and partly from their ignorance in law. Then began the higher court, to draw to themselves the jurisdiction of these matters, and the county courts to be confined to pleas of such matters as exceeded forty shillings in value. The pleas of lands were likewise brought in there, and discussed either in the higher courts, or before justices of *nisi prius*. The appointment of *justices errant*, and *justices of assize*; of *justices of goal delivery*, and of the *quarter sessions*, together with the many powers granted by divers acts of parliament to one or more justices of the peace, have, in a succession of ages, continually sunk the business of these courts, and have left them but a shadow of what they were.

But although most of the business in the old times was in these inferior courts, there was one superior, that even in the Saxon times, had a concurrent jurisdiction with them, the *curia regis*. The *curia regis* sat in the king's palace, and removed with him from one part of the kingdom to another, generally in the king's hall; except when they judged questions belonging to the king's treasure, when they sat in his

‡ Dugdale's *Origines Juridiciales* chap. 9 10, 11, 12, 13, 14, 15.

treasury, called the *exchequer*, from the chequered cloth wherewith the table was covered. The judges were, the justiciary, the chancellor, and the treasurer, together with such great lords as were attendant on the court ; so that, in parliament time, all the great lords sat there ; and this was the foundation of the lords judicature in parliament. The justiciary presided in all cases that did not concern the revenues, and indeed his power was so exorbitant by the ancient law, being regent of the kingdom in the king's absence, that sometime after the conquest, the kings thought proper to abolish the office, and divide even his judicial power into several hands†.

The chancellor was one of the most learned ecclesiastics. It fell, therefore, naturally to his province to make out all writs, and processes, and letters patent, and consequently the great seal of the kingdom was lodged with him. He attended, likewise, something in the nature of an equity judge ; not that there was any such thing as a distinct *court of equity*, but, as a learned and pious man, to direct with his advice whenever the case happened, where conscience dictated one way and the strict law another. The treasurer was present also to take care the king had his fines from offenders, which he was afterwards to collect into the exchequer where he presided, where also he set leases of the king's lands for years, collected his rents and debts, and took care of his escheats and forfeitures. The proper jurisdiction of this court was where the king was concerned in interest as to his revenue ; where one of the great peers was to be tried for heinous offences, or even where two per-

†Madox, Hist. of Excheq. chap. 1.

sons had been guilty of crimes that seemed to have a general influence, and tended to general confusion. For unless the crime of a lower person was very heinous indeed, he was tried in the country, in the tourn.

Civil causes, likewise, between the great lords, fell under their inspection, but those between meaner persons they seldom meddled with, unless they had for difficulty been referred or adjourned to them from the courts below, and if they, in that case, found the cause of great difficulty, they adjourned it to the *curia regis* in full parliament. However, as they had the power of judging civil causes between all persons in the first instance, if they thought the cause of such a nature, that justice was not likely to be done in the country, they had many applications from such as had those apprehensions; and as this court had a discretionary power either of sending them back to the county-court, or of admitting them here, this gave an occasion for exacting fines for license to plead in the king's court, and thereby of increasing the revenue; until at length, when the inferior courts declined in reputation, and every man sought for justice in the *curia regis*, these fines, being arbitrary, became an intolerable grievance, which was remedied by those famous words in Magna Charta, *Nulli vendemus, nulli negabimus justitiam*, as I shall observe hereafter. Such were the courts held in the Saxon times, and for some time after the conquest, whose several jurisdictions it is proper to point out, for the better understanding of the alterations that afterward ensued*.

*Madox, Hist. Excheq. Dalrymple on Feudal Property, ch. 7. § 1.

I next proceed to the *method of trial*, or determining the matters in issue in these courts. And they were the same that were used abroad, which I have already mentioned, and shall therefore barely run them over. First, *ordeal*, either by putting their hands in boiling water, or holding a red hot bar of iron in their hands; or by *cold water*, that is, tying their hands together, and their feet together, and throwing the person accused into a pond; and this method the ignorant vulgar have adopted to try witches. Secondly, the *oath* of the party, with *compurgators*, or as it is called, *waging his law*; and in this manner was Earl Goodwin acquitted of the murder of Alfred, king Ethelred's brother. Thirdly, *battle*, which was the usual method of trying the title to lands, and appeals of felony, or capital crimes.

If a man was indicted of felony at the king's suit, he could not offer battle; for challenging the king was a breach of allegiance; but if he was appealed of felony by a subject, he had his choice either of battle, or submitting to be tried by a jury. But if he waged battle, he must fight in proper person, whereas the appellant, who might be an infant, or decrepid with age, or a man of religion, or a woman, was allowed a champion. If lands were demanded from a man, he had likewise the option of trial by battle, or by *grand assize*. If by battle, then were both parties allowed champions, if they desired it; but the champion, in such case, must first swear, that he knows the land was the right of the party he fought for, or that his father told him he knew it, and charged him to bear witness thereof. So that this trial was referring it

to the providence of God, of which the two contradictory witnesses, the champions, swore true*.

The other method was by the grand assize. *Assize*, coming from *assideo*, to sit together, signifies a jury. It was called *grand*, because of its number. The sheriff returned four knights, who chose twelve knights more, and their verdict determined. But the most usual method of trial among the *Saxons*, was by *juries*, as at this day, that is, by twelve of the *pares curiæ*. The invention of these is attributed by the English lawyers to Alfred, and greatly do they exult over the laws of other countries in the excellency of this method. But had they been acquainted with the ancient laws of the continent, they would have found out the trial by *pares* common to all the northern nations, though since worn out by the introduction of the civil law; not so common, indeed, any where as in England; where every age it gained ground, and wore out the other†. Alfred's merit, therefore, was rather in fixing the number, and determining the qualities of the jurors, than in the invention; but what these several qualifications were, will come in more properly in another place.

*Dugdale, orig. Jurid. ch. 25. 26. Nicholson, præfat. ad leg. Anglo-Sax. Du Cange, voc. Duellum et Juramentum. Spel. voc. Campus et Judicium Dei. Muratori antiq. Ital. Dissertat. 38.

†Stiernhook de jure vetusto Sueonum et Gothorum, c. 4. Dissert. on the antiquity of the English Constitution, part 4. § 4.

LECTURE XXVII.

The punishment of public crimes and private wrongs among the Saxons....The ranks of men among the Saxons....The difficulty of ascertaining the nature of the Saxon estates, and the tenures by which they were held....Observations to prove that the Saxon lands were in general allodial.

IN my last I gave an account of the courts wherein the Saxons administered justice, and of the several methods of trial used in them; it will be proper to add a few words concerning their *punishment* of persons found guilty either of public crimes or private wrongs. When I spoke of the customs of the German nations, while they lived in that country, I observed, that all offences were punished by *finés* only, and none by *death*, two only excepted, desertion in war, and the rape of a married woman. The nations descended from them, when they settled within the limits of the Roman empire, continued the same practice for some ages, as did the Saxons also in England.

All wrong and crimes, not excepting murder and high treason, were redeemable by fine and imprisonment until the Heptarchy was declined; and for this purpose their laws assigned the several mulcts that were to be paid for the different offences. Murder was rated higher or lower according to the quality of the person slain. That of their king himself was

valued at thirty thousand *thrymsæ*, a piece of their money. But afterwards it was found necessary to inflict capital punishments. Treason, murder, rape, and robbery, were of the number so punished, though the punishment of rape was afterwards *castration*; but after the Conquest it was made capital again. Corrupt administration of justice was another; for it is recorded, to the praise of Alfred, that he hanged forty-four unjust judges in one year*. These were the judges in the tourns, ealdermen of the counties, or their deputies the sheriffs. Other offences against the public continued punishable by fine and imprisonment, and satisfaction for private wrongs was obtained either by restoration of the thing unjustly detained, if it was extant, or a compensation to the value in damages, if it was not†.

As to the order and ranks of people among them, there were, properly speaking, but two, *freemen* and *villeins*. The last, I presume, were the remains of the ancient Britons, but among the freemen there were various orders, not distinguished by any hereditary difference of blood, but by the dignities of the offices they held by the gift of the king. Not that we are to imagine there was no regard whatsoever paid to the descendants of great and illustrious men. As their king was eligible out of the royal family only, so there were a number of other families, to whom the enjoyment of these honorable offices were, I may say, confined, not by any positive distinctive law,

*Miroir des Justices, chap. 2.

†Tacit. de Mor. Germ. c. 21. L. L. Wal. p. 192. 194. L. L. Anglo-Sax. ap Wilkins, p. 18. 20. 41. Hickes. disert. Epist. p. 110. Lindenbrog. p. 1404.

but by general practice, and by the king's constantly choosing out of them ; and who may, with propriety enough, be called the *nobility*. Those honorary offices were of different ranks of dignity ; such as those of *ealdermen* or *earls*, *copes*, or as they were sometimes called *Thanes*, *Præpositi*, or rulers of hundreds ; all of whom were, originally, removeable at the king's pleasure, though, unless they misbehaved, they were generally continued for life.

Some, indeed, have thought that earldoms were hereditary, even in the Saxon times, because they see that earl Goodwin's son succeeded him, and the same was true in some other families also. But there is a great difference between a son's succeeding to his father by a legal right of inheritance, and his succeeding either by the voluntary favor of the king, or by his extorted favor, when a family has grown so powerful, as to make it a necessary act in the king, in order to preserve public peace. The latter was the case with respect to earl Goodwin's family. Edward the confessor hated him mortally for the death of his brother Alfred, as he did his whole family for his sake. However, as he owed the crown solely to his interest and intrigues, as he was well acquainted with the power, and knew that he had spirit enough to attempt dethroning him, if once offended, that prince, who was careless of what came after him, so he might reign in peace during life, caressed Goodwin and his family ; dissembled all resentment, and, after one or two weak struggles, let him and his family govern the kingdom at their pleasure ; a conduct that raised them still higher in the opinions of the people, and concurring with the incapacity of Edgar Atheling, Edward's

nephew, raised Harold to the throne, as the only man in England capable of defending it against two powerful invaders*.

But the great difficulty is to know what kind of *estates* the Saxons had in their lands, and by what *tenures* they held them. This question hath divided the lawyers and antiquaries of England; some holding that the tenures were as strictly feudal, as after the conquest, while others as strongly deny it. I shall not, in this difficult point, pretend to decide absolutely where so great masters differ, but only make some observations that perhaps would induce one to believe, that the Saxon lands were, in general, *allodial*, some of them military benefices for life, and none, or if any, at least very few feudal inheritances; and this I take to be the truth of the matter.

First, then, the Saxon lands in general, were inheritances, descendible to heirs; and were all subject to military service. An *Heriot*, which is contended to be the same as the Norman *relief*, was paid upon the death of the ancestor, and all landholders took the oath of allegiance, or of fealty, as they would have it; and therefore, Coke and others conclude that their lands were feudal, and held by knight service; and though there are no traces either of *wardship* or *marriage* to be met with in those times, they insist that they, as fruits of knight service, must have been in use, though from the paucity of the Saxon records remaining, they cannot be discovered†.

This reasoning seems to have great strength, and

*Selden's tit. of Hon. part 2. ch. 5. Hume, vol. 1.

† 1 Inst. 76. Bacon on the Government of Engl. p. 75. Saltern de antiq. leg. Brit. c. 8.

yet, if we examine with a little attention, perhaps, these very arguments, when well considered, will prove the contrary, viz. that most of the Saxon lands were allodial.

First, then, as to their being hereditary : This, singly, is far from being a proof of their being held by a feudal tenure. The lands of the Greeks, of the Romans, I may say of all nations, except the conquering Germans, nay, the allodial lands in their conquests were hereditary. Their being so seems rather a proof of their not being founded on the feudal policy ; for the military benefices did not become inheritances any great length of time before the conquest ; whereas there is no ground to believe that the Saxon lands were ever otherwise. Besides, they had some qualities that are utterly incompatible with the feudal system. They were not only inheritances, but were *alienable* at the pleasure of the owner, without any leave from the superior, and were, likewise, devisable by will ; so that the Saxons were absolute masters of their land, and not obliged to transmit to the blood the donor intended to favor, contrary to the feudal law abroad, and to our law after the conquest. I shall observe, by the way, that some lands in England in particular places, being by custom devisable by will after the conquest, was a relict of the old general Saxon law, those places not having, along with the rest of the kingdom, embraced the feudal maxim†.

Another striking difference is, that the Saxon lands were not forfeitable for felony, which still remains by custom in the *gavelkind* lands in Kent, whence that country proverb, *the father to the bough, and the son*

†Spelman on Feuds and Tenures. ch. 6.

to the plough. Their lands likewise were equally divisible among all the sons, as were gavelkind lands; which is a customary relict of the Saxon law, contrary to general rule, since the conquest, where, at first, the king chose one, and afterwards, as at this day, the eldest alone succeeded. But this last I will not urge against their being of feudal origin, for that was the ancient law of fiefs; it only shews there was a considerable alteration introduced at the conquest. However, though their being inheritances singly will not prove them fiefs, yet, when that is joined to the military tenure, to the payment of reliefs, and to the oath of fealty, we must allow them to be such. Let us see then, whether any of them, singly, or taken altogether, will enable us to draw that conclusion †.

Certain it is, then, that all the lands in England were, in the Saxon times, liable to military service; but this will not prove that they were feudal. For, as I have observed in a former lecture, the allodial lands in France were subject to the same. Every man who held land as an allodial tenant, was, according to the quantity, either to find a foot soldier equipped for the wars, or to join with another to find one, if he had not land sufficient. These allodial lands were subjected by law to three sorts of duties. The first I have mentioned, the other two were building, and repairing bridges, and furnishing waggons and carriages for the conveyance of arms and the king's provisions, or money ‡.

The Saxon lands were, likewise, subject to what

†Taylor and Somner on Gavelkind, and Harris in his Hist. of Kent, p. 457.

‡Spel, gloss. voc. Burghbote et Brughbote.

they called *trinoda necessitas*, the three knotted obligation. The first was, furnishing a foot soldier ; the second, which was not in the allodial lands abroad, was *arcis constructio* the building and keeping in repair castles and forts, where the king, for the public good, ordered them to be erected ; and lastly, *pontis constructio* the building and repairing of bridges. As to furnishing carriages, the Saxon freemen were exempted ; these being supplied, in that constitution, by the lower tenants in ancient demesne ; or the king had a right to seize any man's carriages by his purveyors, and use them upon paying for them. This right of purveyance of carriages, and of timber, and of provisions for the king's household, which was intended for the king's benefit, and by which no less was to accrue to the subject, as he was to be paid the value ; became, in the hands of the greedy purveyors, an occasion of great grievances ; those officers seizing, often more than was wanted, often where nothing was wanted, merely to force the proprietor to a composition of money on restoring them. The manner of payment, too, became very oppressive. The rates were fixed at first at the due value, but as the rate of money changed, and the prices of things rose, it came to be under the half, and as it was not paid for on the spot, but by tickets on the treasurer, the owners were frequently put to more trouble and expence in attendance than the value of their demand. This the purveyors well knew, and therefore turned their office into an engine of extortion. Many were the proclamations issued by the king ; many the acts of parliament made to regulate it ; but the evil was inveterate, and proved very heavy even under the best princes.

The complaints of these oppressions were as great under Elizabeth as under her successor James, and indeed, the evil was so inveterate, that nothing but cutting it up by the roots, the destroying purveyance itself, could cure it*.

But to return to the military duty done by the Saxons in general for their lands. In the first place, then, they served as foot soldiers, and not on horseback, and in complete armor, as the feudal tenants were obliged. Again, the feudal tenants attended not but when called upon, whereas, the Saxons had regular times of meeting and mustering, though not summoned, in order to see that the men were well trained, and properly armed. But the great difference lay in this, that no particular person was bound to military duty, in consideration of his tenure in the lands. The lands themselves were liable. Every hide of land found a man, whether it was in the hands of one, or more persons. There was then no personal attendance, and, consequently, no commutation for it. The hide of land supported its soldier, while he continued fighting in his own county; but if in another, he was to be maintained either by that county, or the king; whereas, the military tenants, by the feudal law, were obliged to serve forty days at their own expence, wherever the king pleased, if the war was just, or a defensive one; and indeed, as William the Conqueror modelled it, if the war was even unjust, or offensive. These differences, added to what I have already observed, concerning their lands not being escheatable for felony, being alienable, and being devisable by will, I think shew plainly that, though the lands were subject to military

*Tyrrel's Introd. p. 130. Spel. Reliq. p. 22.

service, it was upon grounds and principles very different from the feudal ones, and that they were rather in the nature of the allodial lands on the continent.

As to *Heriots*, which Coke and his followers insist much upon, as being *reliefs*, they also, when thoroughly considered, will, perhaps, be found to be of a different nature. A Heriot was a title the landlord had from his tenants, and the king, as supreme landlord, from his, of seizing the best beast of his dead tenant, or his armor, if he was a military man.... These being due upon the death of the tenant, certainly bore some resemblance to the reliefs on the continent, and are in king Canute's law, which was written in Latin, called by the name of *relevatio*. To shew what they were in that time, the *relevatio*, or Heriot of an earl, was eight horses, four saddled, four unsaddled, four helmets, four coats of mail, eight lances, eight shields, four swords, and two hundred marks of gold ; of the king's thane, four horses, two saddled, two unsaddled, two swords, four lances, four shields, his helmet and coat of mail, and fifty marks of gold ; of the middling thane, a horse with his furniture, with his arms. But, then, Spelman justly observes, that these were not paid by the heir, as a relief to the lords, to entitle him to enter on the inheritance. The heir had the lands immediately, and was not obliged to defer his entry till he had paid them, as he was his relief by the feudal law, and by the law of England after the conquest. Nay, they were not paid by the heir at law, but by the executor or administrator, as a perquisite out of the tenant's personal fortune*.

*Dr. Brady's Glossary to his Tracts, p. 3. Spelman on Feuds and Tenures, p. 17, and 18.

However, William the Conqueror, finding these perquisites in use, and that in Latin they were called *relevationes*, took advantage thereof, and as the forfeited lands he bestowed on his Normans were given upon the terms, and with the same burthens as lands on the continent, so were the reliefs he exacted from such in the same manner, made payable by the heir, not the executor; and as to the unforfeited lands, which remained to the Saxons, and were very inconsiderable in number, he, in the manner I shall shew in the next lecture, converted them into real fiefs, such as were then in use in France; from whence the reliefs came, likewise, to be exacted from the heir, and to be considered as redemptions of the inheritance, which upon the principles of the feudal policy, could not be entered upon by the heir till the relief was paid. This alteration it was not in the Saxon landholder's power to oppose, on the account before-mentioned; nor, indeed, was the burthen on the heir such, if no consequences were to be apprehended from it, as deserved opposition; for William fixed the reliefs at a certainty, at the same rate, or with very little addition, as the Heriots were in Canute's law.

But experience soon shewed what effects might follow from the construction of Norman judges, at the devotion of a king, upon the word *relevium* being used, and its becoming payable by the heir, instead of the executor; his son and successor insisted that reliefs were by the feudal law arbitrary, and looked upon his father's limiting them as a void act, that could not bind his successors. He, accordingly, exacted arbitrary and excessive reliefs both from the Norman and Saxon landholders in England, which exasperat-

ed both equally against him ; for though the reliefs in France were, by no law, as yet reduced to a certainty, yet by custom they were to be reasonable, and not to be merely at the will and discretion of the king or lord ; in consequence of which he was, on some occasions, forced to depend almost entirely, in his wars with Normandy, on the mercenary army of the lower English, who had no property. And had his reign continued much longer, it is extremely probable he would have felt severely for the oppressions he laid his military tenants of both nations under. But he dying in ten years, Henry was obliged, before he was elected, to swear to observe the laws of Edward the Confessor, which he did, with such emendations as his father the Conqueror had made ; and accordingly, as to *reliefs* he faithfully observed his oath ; but it being inconvenient for the heir, who was at a call to perform military duty, to be obliged to pay his relief in arms, which he might want on a sudden emergency, it was therefore, generally commuted for money. However, there being no settled rate fixed, at which this commutation should be regulated, this also was made an engine of oppression in John's reign, until it was finally fixed at a certain sum of money, according to the different ranks of the persons, by *Magna Charta*†.

As to the last argument, of the *Oath of fealty* being taken by the Saxons, it is the weakest of all. An oath of fealty taken by a feudal tenant, was to his *lord* whether king or not. It was merely as tenant to him of land, and in consideration of such, and consequently the proprietors of land only were to take it. The

† Madox, Hist. of the Exchequer, vol. 1. chap. 10. § 4.

oath the Saxons took, which is likened to this, was to the king, as king, not as landlord, and not at all in consideration of land ; for every male person above the age of twelve years was obliged to take this oath among the Saxons, whether he had lands or not. In truth, it was no more than an oath of allegiance to the king, as king, which was common in all kingdoms, and not peculiar to those where the feudal maxims prevailed †.

Hence I think I have some liberty to conclude, though I do it with due deference, as the greatest masters in the ancient laws and records of England have been divided in this point, that the very reasons urged to prove that lands were held in the Saxon times as feudal inheritances, prove rather the contrary, and that they were, in the general I mean, of the nature of the allodial lands on the continent.

In my next I shall speak of the alterations introduced by the conqueror, both as to the tenure of lands in England, and as to the administration of justice, which were so remarkable, as to deserve to be considered with the strictest attention, as they laid the foundation for the great alterations that have followed since.

† Spelm. on Feuds and Tenures, chap. 21.

LECTURE XXVIII.

The Saxons, though their lands in general were allodial, were not strangers to military benefices for life....The alterations introduced by William the Norman, as to the tenure of lands in England.

THOUGH, in my last, I have delivered my opinion, that the lands of the Saxons were not feudal, but allodial, I would not be understood as if there were no lands held by them upon military service, different from the allodial I have already described. It is undeniable, that there was among them *lord and vassal*; that there were lands held by such military service as was performed abroad; where the bond of fealty subsisted between lord and tenant, and where the tenants were obliged to serve in person on horseback. But these were few; for the strength of the Saxon army lay in their infantry. Besides, such were not feudal inheritances, but benefices for life, for, in all the records remaining of them, there is not a word implying an estate than could descend, or a single trace of *wardship, marriage, or relief*, the necessary concomitants of such estates. What puts that out of all doubt, in my apprehension, is one of the laws of William himself, where he says it was he that granted lands *in feudum, jure hæreditario*, which words are added, by way of distinguishing the estates

he granted from the military estates for life, in use before. The word *feudum* alone would have been sufficient, had that law been in use before, and the words *jure hæreditario* were added by way of explanation of *feudum*; and *feudum* is added by way of distinction from allodial inheritances†.

When these military benefices began among the Saxons, I cannot say is determined, but shall offer a conjecture, that carries a great face of probability. That they were not coeval with the Heptarchy is certain; for none of the German nations had, at that time, fixed estates for life in their military holdings. What time, then, so probable as the days of Egbert, who had resided long in the court of Charlemagne, where these tenures were in use, and where he saw the benefit of them? Besides, this was the very time that a body of horse began to be wanted, who could move swiftly to encounter the Danes, then beginning their ravages, and whose practice it was to land in separate bodies, and to kill and plunder, until a superior force assembled, and then reimbarking, to commit the same devastations on some other defenceless part of the coast. But these kind of tenures, as I observed before, could be but few, as most of the lands were inheritances appropriated to particular families.

To come now to William. A single battle, wherein Harold and the flower of the nobility were slain, determined the fate of England. However, many of the great men survived, and the bulk of the nation were averse to his pretensions. A weak attempt was made to set up Edgar Atheling, the only prince re-

†Wright on tenures, chap. 2.

maining of the royal race, but the intrigues of the clergy, who were almost universally on the invader's side (on account of his being under the protection of the pope, and having received from him a consecrated banner) co-operating with the approach of his victorious army, soon put an end to Edgar's shadow of royalty. He submitted as did his associates, and they were all received, not only with kindness, but with many high marks of distinction. William, accordingly, was crowned with the unanimous consent of the nation, upon swearing to observe the laws of Edward the Confessor ; and it must be owned he behaved, during his first stay, with the utmost equal justice and impartiality between the Normans and natives. But the continuing to act in that manner did not consist with his views, which were principally two ; the first to gratify his hungry adventurers with lands, the next to subvert the English law, and introduce the feudal and Norman policy in lieu of it.

The first step he made, there was no finding fault with. It was now allowed, that William's title was legal from the beginning, and that Harold was an usurper, and all that adhered to him rebels. He made enquiry for all the great men that fell in battle on Harold's side. Their lands he confiscated, and distributed, upon the terms of the Norman law, to his followers ; but these were not half sufficient to satisfy the expectants, and the English were still too powerful, as he had pardoned all those who survived. He therefore returned to Normandy, carrying Edgar and the chief of the English nobility with him, under pretence of doing them honor, but in reality, that they

†Hale's hist. Com. law, chap 5. and 7.

might be absent while his views were carrying on ; and in the mean time he left his scheme to be executed by his Normans, and those he had appointed his regents. I say *his* scheme, for his interest, to exalt one side and depress the other, on which he could not depend, almost forced him to this conduct. The oppressions, therefore, were so exorbitant in his absence, as must necessarily have driven a people to rebel, and for which a man of justice would think the real delinquents ought to be the persons punished, whilst the unhappy nation merited the freest pardon, for whatever they did when actuated by a despair, proceeding from the denial of justice. But that he himself was the immediate source of these distresses is evident from his temper, which was such that no regents of his durst have acted as they did without his approbation. The Normans began by encroaching on their neighbors the English, nay with forcibly turning them out of their entire possessions. If these applied to the regents in the *curia regis*, there was no redress. If they retaliated the injuries they suffered, they were declared outlaws and rebels †.

These proceedings threw the whole nation into a flame, and, had they had a leader of sufficient weight and abilities to head them, William, perhaps, might have been dethroned ; but the right heir, and all the men he feared, were out of the kingdom. They produced, therefore, only ill-concerted, unconnected insurrections, headed by men of no considerable figure, provoked by private wrongs ; and these being easily suppressed, afforded a fund of new confiscations,

† Bacon's hist. and polit. discourse, chap. 44, 45 &c. Tyrrel's hist.

which he disposed of in the same manner as the former, and thereby spread the use of the feudal law further into several parts of England. However, though he did not spare the insurgents, nor punish his officers that had occasioned those commotions, he did not, as some have asserted, seize all the lands of England as his by right of conquest ; for, when he came over, his court was open to the complaints of the English, and if any of them could undeniably prove, as indeed few of them could, that they had never assisted Harold, or been concerned in the late disturbances, they were restored to their lands as they held them before ; as appears from the case of Edwin Sharrburn, and many others. By these means William obtained the first of his great ends, the transferring almost all the lands of England to his followers, and making them inheritances, descendible according to the Norman law.

But as to the inheritances that still remained in English hands, had he not proceeded somewhat farther, they would have gone in the old course, and been free from the burthen of feudal tenure. But how to alter this, and to subject the few allodial lands, as also the church lands, to the Norman services, was the question ; for he had sworn to observe Edward's laws. The alteration, therefore, must be made by the *commune concilium*, or parliament, and this he was not in the least danger of not carrying, in a house composed of his own countrymen, enriched by his bounty, and who were born and bred under the law he had a mind to introduce ; and who could not be well pleased to see some of the conquered nation enjoy estates on better terms than themselves the conquerors.

The pretence of calling this assembly, which was convened in the fourth year of his reign, was very plausible. The English had grievously and justly complained of the constant violation of the Saxon laws, and the only extenuation that could be made for this, and which had some foundation in truth, was, that the king and his officers were strangers, and not acquainted with that law. He therefore summoned this *commune concilium*, or parliament, to ascertain what the ancient law was, and to make such amendments thereto, as the late change and circumstances of affairs required. And, for their instruction in the old law, which was but partly in writing, most of it customary, he summoned twelve men, the most knowing in the laws of England, out of each county, to assist and inform them what those laws were.

Accordingly, we find the laws of William the First are in general, little other than transcripts of the Saxon laws or customs. However, there are two, which were intended to alter the military policy of the kingdom, to abolish the *trinoda necessitas*, and in its lieu, to make the lands of the English, and of the church liable to knights service, as the Norman's lands were by his new grants, and thereby make the system uniform. His fifty second law is entirely in feudal terms and was certainly drawn up by some person skilled in that law, for the purpose I have mentioned. It runs thus: *Statuimus ut omnes liberi homines fœdere & sacramento affirmant, quod intra et extra universum regnum anglia, Willielmo Domino suo fideles esse volunt, terras & honores illius ubique servare cum eo, & contra inimicos & alienigenas defendere**.

* L. L. Anglo Saxon, ap. Wilkins, p. 228. Wright on tenures, p. 66.

I shall make a few remarks on the wording of this law, and first on the word *statuimus*. Wright † observes, that it being plural, implies that this was not by the king alone, but by the *commune concilium*, or parliament, for the stile of the king of England, when speaking of himself, was for ages after in the singular number, and in the subsequent part he is plainly distinguished from the enactors of the law ; for it is not *mihi*, or *nobis fideles esse*, but *Willielmo Domino suo* in the third person, nor, *terras & honores meos* ; or *nostros servare*, but *terras & honores illius* ; and indeed, in the subsequent law I shall mention it is expressly said in effect, that the subjecting the free lands to knight service was *per commune concilium*. Secondly, the words *liberi homines* is a term of the feudal law, properly applicable to allodial tenants, who held their lands free from the military service that vassals were obliged to. And in this sense it was used in France also, from whence William came. In these words were included also, the men of the church, for as their lands were before subject to the *tripoda necessitas*, it was reasonable when that was abolished, they should be subject to this that came in lieu of it. *Fædere* and *sacramento affirmant*. *Fædus* is the homage, which, though done by the tenant only to the lord, was looked upon by the feudists as a contract, and equally bound both parties, as is *sacramentum* ; as appears after the feudal oath of fealty ; and they are placed in the order they are to be done, homage first and then the oath of fealty. *Willielmo Domino suo*, not *regi*, not the oath of allegiance as king, but the oath of fealty from a tenant to a land-

lord, for the lands he holds. *Fidelis* is the very technical word of the feudal law for a vassal. But the words *intra & extra universum regnum anglia* are particularly to be observed: For these made a deviation from the general principles of the feudal law, and one highly advantageous to the kingly power: By the feudal law no vassal was obliged to serve his lord in war, unless it was a defensive war, or one he thought a just one, nor for any foreign territories belonging to his lord, that was not a part of the seignory of which he held; but this would not effectually serve for the defence of William. He was duke of Normandy, which he held from France, and he knew the king of that country was very jealous of the extraordinary accession of power he had gained by his new territorial acquisition, and would take every occasion, just or unjust, of attacking him there; in short, that he must be almost always in a state of war. Such an obligation on his tenants, of serving every where, was of the highest consequence for him to obtain; nor was it difficult, as most of them had also estates in Normandy, and were by self-interest engaged in its defence.

The next law of his I shall mention is the fifty-eighth, which enjoins all who held lands by military service, and some others, to be in perpetual readiness. It runs to this effect: "We enact and firmly command, that all earls, and barons and knights and servants, *servientes*, (that is the lower soldiers, not knighted, who had not yet got lands, but were quartered on the abbeyes,) and all the freemen, (namely, the Saxon freeholders, and the tenants of the church, which now was subjected to knights ser-

“ vice) of our whole aforesaid kingdom, shall have
“ and keep themselves well in arms, and in horses, as
“ is fitting, and their duty ; and that they should be
“ always ready, and well prepared to fulfil and to act
“ whensoever occasion shall be, according to what
“ they ought by law to do for us from their fiefs and
“ tenements ; and as we have enacted to them by the
“ *commune concilium* of our whole kingdom aforesaid ;
“ and have given and granted to them in fee in he-
“ reditary right.” The great effect of this law was
to settle two things, not expressly mentioned in the
former ; the first to shew the nature of the service
now required, knight service on horseback ; and the
other, to ascertain to all his tenants, Saxons as well as
Normans, the hereditary right they had in their lands,
for if that had not been done by this law, as now all
lands were made feudal, and their titles to them con-
sequently to be decided by that law, they might other-
wise be liable to a construction, according to its prin-
ciples, that any man, who could not shew in his title
words of inheritance, which the Saxons generally
could not, was but tenant for life*.

This general law then put all on the same footing,
and gave them inheritances, as they had before, but
of another nature, the feudal one, and consequently,
made them subject to all its regulations. From this
time, and in consequence of these laws, the maxim
prevailed, that *all lands in England are held from the
king*, and that they all proceeded from his free bounty,
as is strongly implied in the word *concessimus* ; and
hence some, indeed many, have imagined that the

*L. L. Anglo-Saxon, ap. Wilkins. Wright on tenures,
p. 72.

conqueror seized all the lands of England, as his by right of conquest, and distributed them to whom, and on what terms he pleased. With respect to the greater part, which he gave to his Normans, this is true ; but it appears from the records of his time, that it was not universally the case. The laws I have mentioned so changed the nature of the inheritances, which he did not seize, that they were subject to all the same consequences, as if he had so done ; though in truth, with respect to the Saxons, he did not dispossess them. It was but a fiction in law.

I have mentioned that he made the lands of the church liable to knights service, in lieu of the military expedition they were subject to before ; but this is to be understood with some limitation. For where the lands of an ecclesiastical person, or corporation, were barely sufficient to maintain those that did the duty, they, for necessity's sake, were exempted ; and the Saxon expedition being abolished, the contribution thereto fell with it, and they became tenants in *frankalmoine*, or *free alms*. But where an ecclesiastical corporation was rich, and able, besides their necessary support, according to their dignity, they were, by these laws, under the words *liberi homines*, subjected to the new ordained military service, as they had been before to the old, and according to their wealth, were obliged to find one or more knights or horsemen. If they were obliged to furnish as many as a baron regularly was, they were barons, as all the bishops and many of the great abbots were ; and, as barons, sat in the *commune concilium* ; whereas, before, the clergy in general sat in parliament, as well as the laity, not as a separate body, nor invested with

separate rights, but both clergy and laity equally concurred in making laws, whether relative to temporal affairs or spiritual; though, with respect to the latter, it may well be inferred, from the ignorance of the times, that they had almost the entire influence. But after this time the clergy became a separate body from the laity, had distinct interests also, and a separate jurisdiction; nay, I may say, became, in some degree, a separate branch of the legislature, by the right they claimed and exercised, of making canons to bind laity as well as clergy*. But the explaining this would carry me too far at present, so I shall defer it to my next lecture.

In the mean time, I shall just recapitulate the prodigious alteration, as to the properties of landed estates in England, introduced by the two laws of the conqueror's, I have mentioned, from what was their nature and qualities before that time. They had been the absolute proprieties of the owner, (I speak in general) they could be aliened at pleasure, they could be devised by will, were subject to no exactions on the death of the owner, but a very moderate settled heriot paid by the executor. In the mean time, on the death of the ancestor, the heir entered without waiting for the approbation of the lord, or paying any thing for it; and his heir, if there was no will, was all the sons jointly. No wardship, or marriage, was due or exacted, if the heir was a minor. All these, by the feudal custom's being introduced, were quite altered. Lands could no longer be aliened without the consent of the lord. No will or testament concerning them availed any thing. The heir had no

*Madox, *Baronia Angl.* p. 25. Seld. tit. hon. part 2. c. 5.

longer a right to enter into his ancestor's inheritance immediately on his death, until he (not the executor) had paid a relief (and that not a moderate one) and been admitted by the lord. The heir, likewise, was not all the sons jointly, but one, first, such as the lord pleased to prefer ; at length it became settled universally in favor of the eldest ; and the fruits of tenure, wardship, marriage and relief (for the Saxon heriot was, as I have mentioned, a different thing) came in as necessary attendants of a feudal donation.

No wonder, then, that it has been said William introduced a new law, the Norman one. He certainly did so as to landed estates ; but this, as I have observed before, by the consent of his parliament, who, being Normans, were as well pleased with the change as himself ; but it is not true with respect to the other old Saxon laws, which did not clash with the design of introducing the military feudal system. Them he confirmed, and his feudal laws were called only emendations. However, certain it is, his secret design was to eradicate even the Saxon, the laws he had, in pursuance of his coronation oath, confirmed, and that he took many steps thereto ; which though they had not the full effect he intended, wrought considerable changes. What these were, and the consequences of them, shall be the subject of the next lecture.

LECTURE XXIX.

The alterations introduced by William, as to the administration of justice....The Judges of the Curia Regis are appointed from among the Normans....The county courts decline....The introduction of the Norman language....The distinction between courts of record, and not of record....The separation of the spiritual and temporal courts....The consequences of this measure.

WILLIAM, by altering the nature of land estates, and the conditions upon which they were held, had proceeded a good way in his second capital design, the introduction of the Norman, and the abolishing of the Saxon law. And farther than that, it was not proper nor consistent with his honor, who had sworn to Edward's laws, to proceed openly. However, he formed a promising scheme for sapping and undermining the Saxon law by degrees. First, he appointed all the judges of the *curia regis* from among the Normans, persons fond of their own law, ignorant of the English, and therefore incapable, even if they had a mind, to judge according to it.

Before his time this court only meddled with the causes of the great lords, or others that were of great difficulty, but now it was thought proper to discourage the county courts, and to introduce most causes originally into the superior court; and for this there was a reasonable pretence, from the divisions and

factions between the two nations, and the partialities that must ever flow from such a situation of affairs. The ancient laws of England had been written, some in the Saxon, some in the Latin tongue, and the laws of William, and of many of his successors, were penned in the latter language. But in the *curia regis* all the pleadings henceforward were entered in the Norman tongue, the common language of his court, as were also, all the proceedings therein, until the time of Edward the Third. This introduced the technical law terms, and with those came in the maxims and rules of administering justice belonging to that people, which gradually, wherever they differed from, superseded the English. Hence proceeded the great affinity, I may say, identity, between the ancient law of Normandy, as set forth in the *coutumier* of that country, and the law of England, as it stood soon after the conquest.

The analogy, however, did not arise from this alone. Though England borrowed most from Normandy, yet, on the other hand, Normandy borrowed much from England. William, for the ease of his people, who had occasion to frequent his court, or had suits in the *curia regis*, established schools for instructing persons in this language, and obliged parents of substance to send their children thither which had the consequence of abolishing the old Saxon tongue, and forming a new language, from the mixture of both †.

This introduction of a new language, together with the exaltation of the *curia regis*, and the consequent

†Dugdale's orig. jurid. c. 34. Madox, hist. of Excheq. ch. 2. La coutume de Normandie.

depression of the county courts, introduced, as I apprehend, the distinction between the *courts of record* and *not of record*, and made the county courts considered of the latter kind. Courts of record are such whose proceedings are duly entered, which, at that time, was to have been done in the Norman tongue, and which proceedings are of such weight, as, unless reversed, for ever appearing from the record, can never be gainsaid or controverted. Now, to allow such a privilege to the proceedings of the inferior courts, the county ones, where the suitors were judges, and where, besides, the proceedings were in the English language, would have been contrary to the policy of that time, and would have tended rather to the confirmation than depression of the old law. The spiritual courts, also, are not allowed to be courts of record, and that I presume, because they were anciently a part of the county courts, and separated from them, as I shall shew presently in this reign, and therefore could have no greater privilege than the court from which they were derived. However some inferior courts, such as the *tourn*, and the *leet*, were allowed to be courts of record, and that I conceive, both for the benefit of the realm, and the profit of the king; for these were criminal courts, where public offences were punished, and therefore should have all weight given them, and where the king's forfeitures and fines for crimes were found.

I have observed before, that the courts, in the Saxon times, were mixed assemblies, where the bishop and sheriff presided, and mutually assisted each other, and where the bishop, I may add, had a share in the amerciaments and fines. But in this reign the

spiritual and temporal courts were separated by William, a thing which afterwards was of bad consequence to many of his successors, but was, at the time, very serviceable to the views he then had. This was certainly done partly to oblige the pope, who had espoused his title, and at this time was setting up for the universal lord of churchmen, though in after times they carried their pretensions much higher*.

One great engine the popes set on foot to attain the power they aimed at, was to make a distinction between *clergy* and *laity*, to have the matters relating to the former, as well the merely spiritual as the temporal rights they had acquired, cognizable only in their own jurisdictions; and, to preserve the distinction stronger, to forbid their interfering in the temporal courts, upon pretence of their time being taken up in spiritual exercises, and particularly, that it suited not the piety and charity of a clergyman, even by his presence, to countenance the proceeding to sentence of death, or the mutilation of limbs. Many were the laws they made for this purpose, upon motives of pretended piety; and the circumstances and practices of the times contributed greatly to their success. The emperors, kings, and great lords, had the nomination to bishoprics, and other benefices, as their ancestors had been the founders, and their lands were held from them. But shameful was the abuse they made of this power. Upon pretence of the clergy being their beneficiary tenants, according to the principles of the feudal law, they exacted reliefs, and

*Baron Gilbert's hist. of Excheq. p. 55. Lord Littleton's hist. of Henry II. 4to. vol. 1. p. 43. 457. Carte, vol. 1. p. 419. 420.

arbitrary ones from them before investiture, or, to speak in plain terms, they sold them on 'Simoniacal contracts to the highest bidder, as the Conqueror's son William did afterwards in England ; so that the profligate and vicious were advanced to the highest dignities, while the conscientious clergy remained in obscurity ; nay, if they could get no clergyman to come up to their price, they made gifts of the title and temporalities to laymen, nay to children ; it was a matter of little concern that there was no one to do the spiritual office.

Such practices, (and they were too common) gave just and universal offence to all sober persons, so that the popes were generally applauded for their aiming at the reformation of the evils, and for the endeavoring, by their decrees, to reform the morals of the corrupt clergy, and to restore an elective manner of conferring benefices, though their real design was first to become the protectors of the clergy, next, their lords and masters, and then, by their means, to tyrannize over the laity ; a plan which they carried into execution with too much success. This plan was in the height of its operation in William's reign. The foundation of it had been laid before, as I observed, in the many distinctions made between clergy and laity, and the prohibiting the first, except some great ones, from meddling with secular affairs, or tribunals. This separation, however, had not yet taken place in England, and it is not a wonder that William, who had peculiar views of his own in it, as I shall observe, thought it reasonable to oblige his benefactor the pope, and to conform the constitution of this church and nation to that of France, where the clergy were a separate body.

The private views of the king were twofold, the first arose merely from his personal character, his avarice. By the Bishop's ceasing to be a judge in the temporal courts, he lost his share of the mulcts or fines imposed therein, and in consequence the king's two thirds of them were increased. But his other view lay deeper. To comprehend this, we must remember how great was the ignorance of those ages. Scarce a man, except a clergyman, could read or write, insomuch that being able to read was looked upon as a proof of being in orders. Many even of the greatest lords could not write their names, but signed *marks*; and from this ignorance it was that proceeded the great weight our law gives to *sealing* above *signing* any instrument, and that sealing is what makes it a man's deed. It followed from hence that the laity must be grossly ignorant in point of the laws. Their knowledge could extend no farther than as they remembered a few particular cases, that fell under their own observation; whereas the clergy had the benefit of reading the written laws, and consulting the proceedings thereon, in the rolls of the courts of justice, and they were the only lawyers of the times; insomuch that it became a proverb, *nullus clericus nisi causidicus*.

What method then could so effectually answer the king's end of making the Saxon law fall into oblivion, which he could not openly abolish, after having solemnly sworn to observe it, as the removing from the courts of justice those persons who only knew it, and could oppose any innovation his Norman ministers should attempt to introduce. This policy, however, as artfully as it was laid, had not its full effect; for ma-

ny of the clergy, unwilling to lose so gainful a trade appeared still in these courts in disguise, as laymen, and at this time it is very probably conjectured that that ornament of the serjeant at law's dress, the *coiff*, was introduced, and for this very purpose of hiding the tonsure, which would have shewn them to be clerks. This their attendance, in some degree, frustrated the scheme, and many of the Saxon laws, such especially as were repeated in William's, kept their ground, but many more were forgotten.

I mentioned that one motive of William's to separate the jurisdictions, was to oblige the pope, to whose favor he owed much, yet it ought to be observed to his honor, that he maintained the independency of his kingdom with a royal firmness. Pope Gregory, commonly called Hildebrand, who was the first that ventured so far as to excommunicate sovereign princes, as he did the emperor no less than four different times, conceiving William could not sit securely on his throne without the aid of his see, demanded of him homage for the kingdom of England, and the arrears of Peter's pence; grounding his claim of superiority on his predecessor's consecrated banner, and that Peter-pence was the service by which the kingdom was held from the holy see. But he found he had a man of spirit to deal with. William allowed the justice of the demand of Peter-pence, and promised to have it collected and paid, not as a tribute, but as a charitable foundation, as in truth it was, to support a college of English students at Rome, for the benefit of the English church. As to *homage*, he absolutely refused it, and declared he held his crown from God alone, and would maintain its inde-

pendence ; and to convince the pope he was in earnest, he issued an edict forbidding, on their allegiance, his subjects to acknowledge any person for sovereign pontiff, until he had first acknowledged him. So bold a step convinced Gregory, who was already sufficiently embroiled with the emperor, that this was no fit time to push things ; and so he dropped his project, but without retracting it ; for the court of Rome never did in any case formally recede from a pretension it had once advanced.

The consequences of the separation of the ecclesiastical from the temporal jurisdiction were many. It naturally occasioned controversies concerning the respective limits, and these gave rise to the *curia regis* interposing in these matters, and, by prohibitions, preventing one from encroaching upon the other. The great contest was concerning suits for benefices, or church livings, which the clergy contended were of *spiritual*, and the king's courts, of *temporal* cognizance. And this, indeed, was the great question that, in those days, divided the Christian world abroad. However in England, the clergy were, at length, foiled in this point. But a much greater evil arose from this separation. It is a maxim of all laws, that no man should be twice punished for the same crime, and this just maxim the clergy, in favor of the members of their own body, perverted in a shocking manner. If a clerk committed murder, rape, or robbery, the bishop tried and condemned him to penance ; and this sentence was made a pretence of not delivering him to the temporal courts, to be tried for his life. This was one of the great disputes concerning the consti-

tations of Clarendon, in Henry the Second's time, between him and archbishop Becket †.

At length, about Henry the Third's reign, the limits between the several jurisdictions were pretty well settled, and by subsequent statutes, and judicial resolutions, are confined to the respective limits they are now under. Indeed, since the Reformation, as the credit of the canon law has declined, on account of the dilatory proceedings, and the use of excommunication upon every trifling contempt, the reputation of the ecclesiastical courts has greatly fallen, and prohibitions are now issued, in many cases, where they could not have been granted in former times. Yet, if we examine accurately, we shall find that these great complaints, which, it must be owned, are in the general just, namely, of dilatoriness and excommunications, proceeded from the separation of the two courts by William. Before, when the courts sat together, the sheriff assisted the bishop, and by his temporal power compelled the parties to appear, and submit to the sentence, if they were contumacious against excommunication. But when they were separated, the bishop was left to his spiritual arms, merely, excommunication; and as the consequences of such a sentence were, in the superstitious times, looked on as very dreadful, and are really severe in law, several intermediate processes and notices were necessary before they proceeded to that extremity; and this gave opportunity to litigious persons to disobey every order the court made in a cause, until they came to the

†Madox, Excheq. ch. 1. Bacon on the laws and government of England, part 1. ch. 59. and 66. Brady, Carte and Tyrrel.

brink of excommunication, and that way, by repeated contumacies, to spin out causes to an unconscionable length. And the want of other arms compelled these courts, on very trifling contempts, to enforce their orders by excommunication, which, it must be owned, according to its primitive and right use, should be reserved only for flagitious immoralities*.

Another evil consequence that flowed from this separation of these courts, was, that the pope cunningly got his, the canon law, introduced into the ecclesiastical courts, which made him the head of the church, introduced appeals to him, and in effect, robbed the king of so many subjects in ecclesiastical affairs, whereas, before, though there might be references in cases of difficulty for advice to Rome, there were no appeals thither. The *curia regis* was to reform ecclesiastical judgments, and the ecclesiastical, as well as temporal jurisdiction, was the king's.

Another evil consequence, and it is the last I shall mention, of this alteration, was the setting up two legislatures, if I may say so, in the kingdom. In the ancient time all laws were made in the same assembly, but now, the clergy being separated from the laity, when a parliament was called, the business became divided; ecclesiastical matters, and the taxes on the clergy, were handled in the convocation, as temporal matters, and the taxes on the laity, were in parliament. This contributed to the further clashing of jurisdictions. For it must be owned the convocation exceeded their powers, and made canons about things merely temporal; which, however, they contended to

* Hale, hist. com. law, ch. 7. Bacon, hist. and polit. discourse, p. 129. &c.

be spiritual ; and sometimes contrary to the express law of the land, nevertheless they by the superstitious and ignorant, who knew not the distinction between such things, were generally obeyed, and hence from such submission it is, that, by custom, in several places, tithes are payable of things that are not tithable at common law.

The right of the convocation's canons binding the laity in spiritual matters was never doubted in the times of popery, nay till Charles the First's time, if they had the approbation of the king, who was the head of the church, it was the general opinion, except among the Puritans. But since that time their jurisdiction is settled on a reasonable footing. Their canons bind no man, spiritual or lay, in temporal matters. They bind no layman in spiritual matters ; but they bind the clergy in spiritual matters, provided that no right of the laity is thereby infringed. As for instance, there is a canon forbidding clergymen to celebrate marriage out of canonical hours. This doth not bind even a clergyman, for if it did, it would strip the laity of their right of being married at any hour. However it is to be considered whether a canon of the convocation is a new ordinance, or only a repetition of the old ecclesiastical law. If the latter, it binds all men, spiritual and lay, not as a canon, but as the law of the land.

 LECTURE XXX.

Robert Duke of Normandy, and William Rufus, dispute the succession to the Conqueror....The English prefer the latter. The forest laws....The cruelty and oppressions of William. The advancement of Henry, the Conqueror's youngest son, to the crown of England...He grants a charter....The nature of this charter....His dispute with Anselm concerning Investitures....The celibacy of the clergy....State of the kingdom under Stephen.

WILLIAM the Conqueror left three sons, Robert, William and Henry. The eldest, Robert, according to the established rules of the French fiefs, succeeded in Normandy, and on account of his primogeniture laid claim also to the crown of England; but what right that gave him, might in those days, well be a question. In the Saxon times the rule was to elect a king out of the royal family, and the election generally fell on the eldest son, though not universally; for the line of Alfred reigned in prejudice to the descendants of his two elder brothers. Edred succeeded to his brother Edmund, in prejudice of Edmund's two sons; again, on Edred's death, his son was excluded, and Edmund's eldest son resigned; and lastly Edward the Confessor was king, though his elder brother's son was living. So that priority of birth was rather a circumstance influencing the people's choice, than what gave an absolute right of succession†.

† Tyrrel's *Introduct.* to his *hist.*

Another thing, it might be pretended, should determine this point, that is, as William claimed the crown through the will, as he said, of the Confessor, he also had not a power to bequeath the crown. When, therefore, he was making his will he was applied to on this head, but the approach of death seems to make him acknowledge that his only just title was his *election*, for though he hated his son Robert, and was extremely fond of William, he refused to dispose of it by will. He only expressed his wish that William might succeed, and dispatched him to England, with letters to Lanfranc archbishop of Canterbury, requesting him to influence the election in his favor and he accordingly was crowned. Indeed, it seems a little odd that William, whose bad qualities were universally known (for he had not one single virtue, except personal bravery) should be preferred to Robert, who, with that virtue, possessed all the amiable virtues of humanity.

That the native English should prefer any one to Robert is not to be wondered at, as he had, on all occasions, expressed the highest aversion to them, but they had no influence in the matter ; and it appears, at first view, the interest of the English lords, most of whom had also estates in Normandy, to be subject to one monarch, and not have their estates liable to confiscation, on taking part with one of the brothers against the other. But the interest of Lanfranc and the clergy, added to his father's treasure, which he had seized, and distributed liberally, bore down all opposition ; and indeed, it is probable that Robert's disposition, which was well known, operated in his disfavor ; for his extreme indolence and prodigal-

ity, and his scruple of using improper means for attaining the most desirable ends (whereas William was extremely active and would stick at nothing) made it easy for persons of any penetration to see in whose favor the contest between the two brothers must end †.

We have little to say of the laws in his time, for he regarded no laws, divine or human, ecclesiastical or temporal. He chose for judges and courtiers the most profligate persons he could find. And one of the great oppressions his people labored under was the extending, and aggravating the forest laws. The *forests* were large tracts of land, set apart by his father for the king's hunting out of the royal demesnes; and consequently William his father had by his own authority, made laws, and severe ones, to be observed in these districts for the preservation of the game, and erected courts to try offenders, and trespassers in his forests. The great intention of these courts was to fleece his subjects, who were as fond of hunting as their sovereign, by mulcts and fines; and in truth these were the only oppressions his countrymen, the Normans, suffered under the Conqueror.

But Ruffus flew out of all bounds. He introduced the *lawing*, as it is called, the Hamstringings of Dogs; nay, he made a law, by his own authority, to make the killing of a deer capital. On pretence of this law he seized many of the great and rich, confined them for years, without bringing them to trial, until he forced them to compound, and to give up the better part of their estates. Not content with harrasing the laity, he laid sacrilegious hands on the church

† Carte, vol. 1. p. 452, 453.

revenues. Whenever a rich abbey, or bishoprick, fell vacant, he laid his hands on the temporalities, kept them vacant for years, as he did that of Canterbury four years ; and even, when he was prevailed upon to fill them, he openly set them to sale in his presence, and gave them to the best bidder. However, in a violent fit of sickness, he promised to reform, and did till he recovered his strength, when his reformation vanished. The remonstrances of his clergy, or the pope, had no effect with him ; and indeed, the circumstances of the times were favorable. For as there were two popes, one made by the emperor, the other, by the Romans, who disowned the imperial authority in that respect, William acknowledged neither, and each was afraid to drive him into his adversaries party, by proceeding to extremities.

These enormities raised him so many enemies among his subjects, of all kinds, that Robert had a strong party, and an insurrection was begun in his favor, which William, profiting of Robert's indolence, easily suppressed, and then invaded him in Normandy, and was near conquering it, as, by a sum of money, he detached the king of France from the alliance, if he had not been invaded by Scotland, in favor of Robert. He patched up, therefore, a peace with him, ratified by the barons on both sides, the terms of which were, that the adherents of each should be pardoned, and restored to their estates, and the survivor succeed to the other †.

Thus there was a legal-settlement of the crown of England made, which ought to have taken place, but

† Kennet's historians, and Carte.

did not. For William being accidentally killed in hunting, while Robert was absent in Italy, on his return from the holy war, Henry the youngest son took the advantage, and seizing his brother William's treasure, was crowned the third day, after a very tumultuous election, the populace threatening death to any that should oppose him. The reason of their attachment to him was, that he was, by birth, an Englishman, and therefore, they hoped for milder treatment from him than they had met from his two Norman predecessors. Besides he had promised a renewal of the Confessor's laws, with such emendations as his father had made. And in pursuance of this promise, as soon as he was crowned, he issued a charter, containing the laws as he now settled them, and sent copies of it to every cathedral in his kingdom.

These laws were, as to the bulk of them, the old Saxon constitutions, with the addition of the Conqueror's law of fives, and some things taken from the compilations of the canon law. However, with respect to the feudal law, he, in many instances, moderated its severity. With respect to *reliefs*, he abolished the arbitrary and heavy ones which William had exacted, and restored the moderate, and certain ones, which his father had established. With respect to the *marriage* of his vassal's children, he gave their parents and relations free power of disposing of them, provided they did not marry them to his enemies, for obviating which, his consent was to be applied for, but then he expressly engaged not to take any thing for his consent ; and the *wardships* of his minor tenants he committed to their nearest kindred, that they might take care of the persons and estates of the

ward, and account with him for the profits during the minority, upon reasonable terms. He even, in some degree, restored the Saxon *law of descents*, and permitted alienation of lands. For if a man had several *fifes*, and several sons, the eldest had the principal one, on which was the place of habitation, only, and the rest went among the sons, as far as they would go; and if a man purchased or acquired land (as land might be alienated by the feudal law, with the consent of the superior lord,) such acquisitions by the laws of Henry, he was not obliged to transmit to his heirs, but might alien at pleasure†.

This mitigation of the former law was very agreeable to his people, both English and Normans. The former were pleased to see the Saxon law so nearly restored, and the latter, harrassed with the oppressions of William, were glad to have the heavy burthens of their tenures lightened; and indeed, began, by degrees, to relish the old English law, and to prefer it to their own.

To attach the bulk of his subjects to him still more strongly, he took another very prudent step. He married Maud the daughter of the king of Scotland, by Edgar Atheling's sister, so that in his issue the blood of the Norman and Saxon kings were united. But still he was not firmly settled, until the affairs of the church, and the right of lay persons granting investitures of church livings were settled. He intended to proceed in the same manner his father and brother had done. He accordingly named persons to the vacant bishoprics, and recalled Anselm, archbishop of Can-

† Hale, hist. com. law, chap. 7. Carte, vol. 1. p. 480. et seq.

terbury, who had lived in exile during the latter part of William's reign, on account of the then famous dispute of lay investitures. But Anselm, adhering to the canons of a council held at Rome, refused to consecrate the bishops named by the king, and also to do him homage for the temporalities of his own see, which the king required before he gave him possession.

Henry, afraid of detaching from himself, and attaching to his brother Robert, the pope and so powerful a body as the bulk of the clergy, with so popular and high spirited a priest at their head, was obliged to propose an expedient, that he should send ambassadors to the pope, to represent that these canons were contrary to the ancient law and customs of the nation, and to endeavor to obtain a dispensation for not complying with the canons ; and that, in the mean time, Anselm might enter into the temporalities of his see. This proposal was accepted. But though the king's desiring to do that by dispensation, which he had a right to do by law, was tacitly giving up his cause, the pope knew his own strength, and Henry's weakness too well, to grant this favor. He insisted on the canons being executed, which produced another quarrel between the king and archbishop. The archbishop, attended by other bishops his adherents, went to Rome to complain. The king sent new ambassadors, but all in vain. The pope proceeded to threaten excommunication, which, in those days of superstition, would have tumbled Henry from the throne, so he was obliged to submit, and come to a composition. He renounced the nomination and investiture *per annulum & baculum*, restored the free

election of bishops and abbots to the chapters and convents, which, as the pope was the judge of the validity of such elections, was, in effect, almost giving them to him; and in acknowledgment of his ancient right of patronage, was allowed the custody of the temporalities during the vacancy; was allowed to give the *conge d'elire*, or licence to proceed to election, without which they could not elect, and was allowed to receive homage from the elect, upon the restitution of the temporalities.

Thus the pope gratified the king with the shadow, and gained to himself and the church the substance, and thus, at this time ended, that contest in England, which had cost so many thousand lives abroad, between the pope and emperors. Henry, however, retained considerable influence in the elections, for before he issued his *conge d'elire*, he generally convened his nobles and prelates, and with them recommended a proper person, who generally was chosen; and this the pope, for the present, suffered to pass†.

I have little else to observe touching the laws in this reign, save what pertains to the *celibacy of the clergy*. The popes, aiming at detaching the clergy entirely from secular interests, had made many canons against their marrying, and all the eloquence of some centuries had been employed in recommending celibacy. These canons, however, had not their full effect in England; for very many of the secular clergy were still married. Anselm, in a synod he assembled, enacted a canon against them, commanding them to dismiss their wives, upon pain of suspension, and excommunication, if they presumed to continue

† Carte; and Kennet's historians.

to officiate. Cardinal de Crema was afterwards sent legate by the pope to England, where, in a general assembly of the clergy, he re-enacted the canons against their marriages, and presiding in a lofty throne, uttered a most furious declamation against such a sinful practice, declaring it a horrid abomination, that priests should rise from the arms of a strumpet, and consecrate the body of Christ. And yet the historians assure us, that, after consecrating the eucharist in that assembly, he was found that very night in the stews of Southwark, in bed with a prostitute ; which made him so ashamed, that he stole privately out of England†.

Henry, though he had subdued Normandy, and kept his brother Robert in prison, was not without uneasiness as to the succession to his dominions ; for Robert's son was an accomplished prince, and protected by the king of France, whereas his own bore but a worthless character. However, to secure the succession to him, he assembled the barons of Normandy in Normandy, and those of England in England, and prevailed on them to take the oath of allegiance to him as such. But he being soon after drowned, the king, in hopes of male issue, took a second wife, and after three years fruitless expectation, he turned his thoughts to making his daughter Maud his heir, and did accordingly prevail on his nobility to take the oath of allegiance to her as successor. But one of the steps he took for securing the throne to her, in fact, defeated his scheme. He knew that a woman had never yet sat on an European throne, that Spain, which was the only nation that admitted persons to

Kennet's historians. Hume, vol. 1. p. 243.

reign in the right of females, had never suffered the female herself, but always set up her son, if he was of a competent age ; if not, her husband. As to the circumstances of his own family, his grandson was an infant, and neither he nor his daughter had confidence in her husband. He knew that this oath was taken against the general bent of his people, and that little dependance could be had on it when he was gone, so easy was it to get absolution. His chief dependance was on the power and influence of his natural son Robert, who, indeed, did not disappoint him, and of his nephew Stephen, and of his brother Roger, bishop of Salisbury, on all of whom he heaped wealth and honors.

Stephen, thus advanced, began to lift his eyes to the crown. He, as well as his cousin Maud, was a grandchild of the Conqueror, and descended from the Saxon kings ; and he had the personal advantage of being a male, and bearing an extraordinary good character. By his ability and generosity he had become exceedingly popular, and his brother Roger secured the clergy in his interest. Immediately on his uncle's death, he seized his treasure, which he employed as Henry had done William's, and having spread a report that Henry, on his death bed, had disinherited Maud, and made him his heir, he was crowned in a very thin assembly of barons. Sensible of his weakness, he immediately convoked a parliament at Oxford, where, of his own motion, he swore, not only to rule with equity, but that he would not retain vacant benefices long in his hands, that he would sue none for trespassing in his forests, that he would disforest all such as had been made by the late

king, and abolish the odious tax of *Danegelt*; concessions, which, with the pope's approbation of his title, so satisfied the people, that all the lords and prelates who favored Maud, and had kept aloof, and among them Robert her brother, came in, and swore allegiance to him as long as he kept these engagements; from which conditional oath they expected he would soon release them, and indeed they did all they could to provoke him to it. This bait taking, and he having disoblged his brother and the clergy, Maud's friends rose in her favor; and made the kingdom for many years a field of blood †.

In one of these battles Stephen was taken, and Maud was universally acknowledged; but her insufferable haughtiness, her inflexible severity to her captive, and her haughty refusal of the city of London's request, to mitigate her father's laws, and restore the Saxon, so alienated the people from her, that she was forced to fly from London, and arms were again taken up for Stephen. Her brother, who was the soul of her cause, being soon after taken prisoner, was exchanged for Stephen, and he dying soon after, Maud was forced to leave the kingdom to her competitor. However, Stephen continuing still embroiled with the clergy, her son Henry, in a few years after, invaded England, and was joined by multitudes; but some noblemen, who loved their country, mediated a peace, and at last effected it on the following terms; that Stephen should reign during life; that Henry should succeed him, and receive hostages at the present for the delivery of the king's castles to him

† Bacon, hist. and polit. disc. p. 103, &c. Carte, vol. 1. p. 525. et seq.

on Stephen's death ; and that, in the interim, he should be consulted with on all the great affairs of the kingdom ; and this agreement was ratified by the oaths of all the nobility of both sides. In this treaty no mention was made of Maud's title, though she was living †.

† Kennet's historians.

 LECTURE XXXI,

Henry II. succeeds to the crown....The reformation of abuses....Alterations introduced into the English Law....The commutation of services into money....Escuage or Scutage, Reliefs....Assizes of novel disseisin, and other assizes.

UPON Stephen's death, Henry the Second succeeded, according to the settlement of the crown before made, and came to the possession of the kingdom with greater advantages than most kings ever did.... He was in the flower of youth, had an agreeable person, and had already given the most convincing proofs both of wisdom and valor. He was by far the most powerful prince of his time : For, besides England, which when united to its king in affection, was, by the greatness of its royal demesnes, and the number of knights fees, incomparably the mightiest state in Europe, in proportion to its extent ; he had in France, where he was but a vassal, greater territories than the king of France himself. In him were united three great fees, to each of which belonged several great dependencies ; Anjou, which came from his father ; Normandy from his mother, and Guienne by his wife. And, from the very first steps he took on coming to the throne, his subjects had good foundation to hope that this great power would be principally exerted to make them happy. The whole reign of Stephen, until the last pacification, had been a scene of dismal con-

fusion, in which every lord of a castle tyrannized at pleasure, during the competition for the crown ; and though, from the time of the settlement of peace, Stephen published edicts to restrain violence and rapine, and made a progress through the kingdom, in order to re-establish justice and order, he lived not long enough to see his good intentions answered, but left the work to be accomplished by his successor.

The first thing Henry did was to discharge a multitude of foreigners, whom Stephen kept in arms during his whole reign. His next care was the reformation of the coin, which had been greatly debased.... He coined money of the due weight and fineness, and then cried down the adulterated which had, in the late reign, been counterfeited by the Jews, and the many petty tyrants in their castles. These to humble and make amenable to law, was his next concern. As to the castles in private hands, that had been erected in his grandfather's time, or before, he meddled not with them ; but all that had been built during Stephen's reign, either by permission or connivance, through the weakness of that prince, which were the great nuisances, he issued a proclamation for demolishing, except some few, which, from their convenient situation, he chose to keep in his own hands, for the defence of the realm. And, lastly, as the crown had been greatly impoverished by the alienations, Stephen had, through necessity been forced to make, he issued another, to renounce all the ancient demesnes that had been so alienated, that he might be enabled to support his dignity without loading his people, except on extraordinary occasions†.

† Hale, hist. com. law, chap. 7. Carte.

These reformations, however just in themselves, or agreeable to the subject, he did not proceed on merely by his own authority. He had deliberated with the nobles, who attended at his coronation, concerning them, and had their approbation ; and though there were no acts of parliament made at that time, yet, as form in those days was less minded than substance, these edicts had the obedience of laws immediately paid them by all, except some mutinous noblemen, who still held their castles in a state of defence. Having taken these prudent steps, he formed his privy council of the best and wisest men of the nation, and by their advice summoned a regular parliament, wherein many good regulations were made. The laws of the Confessor, as amended by Henry the First, were re-established, and every thing, both in church and state, settled on the footing they were in the time of that king. Being thus armed with a full parliamentary authority, he marched against his mutinous nobles, whom he soon brought to submit ; and demolished their castles.

In another parliament, in order to settle the succession, contests about which had had fatal effects ever since the death of the Conqueror, he prevailed on his subjects to take the oath of allegiance, to his two sons, though both in their infancy, first to William, then to Henry, as his successors. And having taken all these wise and just measures, for the peace and security of his kingdom, he repaired to his foreign dominions ; but his transactions there, or even at home, that do not relate to the laws or constitution, are not within the compass of the design of these lectures. Let it suffice to say, that he made as good

laws for, and was as good a sovereign to, his French as his English subjects.

In his reign many were the alterations introduced into the English law, most of them, no doubt, by act of parliament, though the records of them are lost. For, in the beginning of his reign, as I observed, he enacted in parliament the laws of Henry the First ; and yet from the book of Glanville, written in the latter end of his reign, it is plain there were great changes, and the law was very much brought back to what it was in the Conqueror's reign ; nay, in one respect, to what it was in Rufus's, I mean reliefs, the law of which I shall mention hereafter. Many likewise were the regulations he introduced of his own authority, which in the event proved very beneficial to his subjects.

The first I shall take notice of was his commutation of the services due of his tenants in demesne, which formerly were paid in provisions and other necessaries, into a certain sum of money, adequate to the then usual price. His grandfather Henry did somewhat of this kind, but he it was that established and fixed it ; and his example was followed by his lords, so that, from this time, rents became generally paid in certain yearly sums of money, instead of corn and provisions. What advantage the successors of these socage tenants gained thereby will be evident, if we consider the price of things at or about that time. In the reign of Henry the First, we are told, the current price of several commodities, which, however, must be trebled when reduced to the money of our standard, were as follows : That of a fat ox five shillings, of our money fifteen ; a wether four pence, of ours,

a shilling ; wheat to serve an hundred men with bread for one meal, a shilling, of ours, three shillings ; a ration for twenty horses for a day, four pence, of our money a shilling. And although we should allow that, in Henry the second's time, the prices of things were even doubled, which is impossible to be admitted, it is easy to see how greatly the future socage tenants paying the same nominal rent, the value of which was daily decreasing, rose in wealth and importance. Besides they were greatly eased in point of the expense and trouble of carrying the provisions to the king's court, to which before they were obliged, wherever he resided in England ; whereas, now, they had only to carry, or send by a proper messenger, the money to be accepted as an equivalent †.

His military tenants he eased in a much more considerable manner. By the law of the Conqueror, every military man was obliged to serve at his own expense forty days as well abroad, where the king's occasions required, as in England, and in person too, unless notoriously incapable ; in which case they were obliged to find each a deputy, and if they failed herein, by the strictness of the feudal law, they forfeited their lands, or rather, as the law was used in England, compounded at the king's pleasure ; which, if he was very avaricious, came pretty near the same thing.... This was a miserable heavy grievance. For what oppression must it be for a knight of Northumberland, who had, perhaps, but a single fee, to transport himself, it may be, to Guienne, to serve forty days, and then return ? Nay, it was inconvenient to the king himself ; for as France, where the scene of the

†Gervaa. de Tilbury, dial. de Scaccario.

king of England's wars generally lay, was every where full of fortifications, it was scarcely possible to finish a war in forty days, however great the humor of that age was for pitched battles ; the consequence of which was, that, after that time, the king was ever in danger of being left in the midst of a campaign with an inferior army.

Henry then, sensible of these inconveniences, both to himself and his subjects, devised *escuage*, or *scutage*, in the fourth year of his reign, upon account of his war with Toulouse upon which his wife had some pretensions. He, knowing that this war required but a small part of his force, did, both in Normandy and England, publish, that such of his military tenants as would beforehand pay a certain sum of money, should be excused from serving, either in person or by deputy ; and this sum which was rated by him extremely moderately, and was, therefore, generally paid by his vassals, rather than serve in so remote a place, he employed in hiring mercenary soldiers of fortune, of whom there were plenty on the continent ; and those by their engagement, were obliged to serve during the continuance of the war†.

That his sole view, in this new project, was the ease of his people, and the better prosecution of his wars, and not the depressing the military spirit of his subjects, appears from hence ; that those who were qualified, and chose to serve in person, he caressed, and encouraged by all means possible ; that he never brought a single mercenary into England, when he had wars with Wales or Scotland, but insisted on his subjects personal service ; nay, that he never kept

† Madox, hist. of Excheq. ch. 16.

those mercenaries on foot in his foreign dominions, but dismissed them as soon as the war was at an end. And this of *scutage* was the general method he followed in his subsequent wars in France and Ireland. What wonder is it then, that this prince was universally beloved by his people of all ranks? though, as the best institutions are liable to be corrupted, this very *scutage*, that he devised for public ease, was turned into an heavy engine of oppression by his son John.

Another alteration in the law in the reign of this king, was the point of *reliefs*, as I mentioned before. The old relief of William the First, which was restored by Henry the First, was certain, to all lords and knights, according to their degrees, and was paid in horses and arms; but now the humor of the times being that every thing should be paid in money, the relief of a knight's fee was settled at one hundred shillings, the fourth part of its then computed yearly value, and which I suppose was about the price of the armor, a knight was before to pay; and henceforward the arms of the deceased descended to the heir, and consequently the coats of arms blazoned thereon became hereditary. But the reliefs of barons, or earls, were not settled at this time, but remained arbitrary, as Glanville informs us. *De baroniis & comitatibus nihil certum est statutum, quia juxta voluntatem et misericordiam domini regis solent baronia capitales de releviis suis domino regi satisfacere*†.

From the word *statutum* I take it for granted this change of reliefs into money was by act of parliament. Indeed, how could it be otherwise; but, then, the

† Lib. 9. c. 4.

most surprising circumstance is, that the great lords who, in that age principally composed the parliament, should take care in this material point, of the knights, the lower military tenants, and leave themselves at the mercy of the crown. I shall venture on conjecture to assign the reason. The Conqueror settled the reliefs of earls and barons at a certainty, because he had fixed the number of knights fees they should contain ; twenty to an earldom, and thirteen and two-thirds to a barony ; but by the time of Henry the Second, the number of knights fees contained in them might be greater or less. For instance, if an earl died, and left two daughters, his twenty fees would be divided equally between them ; but the dignity was to go to the husband of that daughter the king chose. Now it would be hard that he should pay for ten knights fees, merely because he had the same title, as much as the predecessor paid for twenty. Again, in the new created honors, it seems very probable, from many circumstances, that an earldom might be erected but with fifteen knights fees, or, perhaps, with twenty-five. The certainty of the *quantum* of land an earldom or barony should consist of, not being settled, I imagine, was the reason that the *quantum* of relief was not expressly determined, though, by fixing that of a knight's fee, the reasonable relief might, in any case be easily determined. And that Henry, and his son Richard, exercised that discretion the law left in them in this equitable manner, we may infer from there being no complaints, as to reliefs, from the earls or barons, during their reigns ; but John revived the arbitrary relief of William Rufus, to the great oppression of his nobles, until he was restrained by *Magna Charta*.

To no other reign than this, I think, can be ascribed, so properly, the invention of *assizes of novel disseisin*, and the other *assizes*, for obtaining possession of lands. By the strictness of the very ancient feudal law, if a man had been disseised, that is, turned out of possession, if he did not enter, and regain his possession, or, at least, claim it within a year and a day, he lost all right; for, if he was a socage tenant, the possessor had, within that time, paid a rent to his lord, and been by him, who was supposed the best judge, allowed to be the rightful tenant; and, if he was a military one, it was probable, in those ages of perpetual war, he had actually served, at least he had kept himself in constant readiness if called upon. But the limitation of a year and a day being soon found too short, it was afterwards extended to five years; then, to the time of the possession of the disseisor himself, namely till he had either died or aliened it. But upon the alienee, or heir of the disseisor, he could not enter, because they came in honestly, by a fair title, and were guilty of no wrong. However, this ancient law, that gave no remedy but by entry, during the seisor's possession, was still too severe; for the *disseisor* might alien, or die suddenly, before the *disseisee* could enter, or he might hold the possession *manu forti*, so that the *disseisee* might not be strong enough to enter and recover his possession*.

To remedy these evils; and to prevent bloodshed, the law provided for the *disseisee* his right of action, either against the *disseisor* himself, or his heir or assigns, and in which, upon shewing his right to the land, he should be restored to his possession by the

*Coke on Littleton, fol. 153.

king's officer, the sheriff, with the *posse* of the county. But still this action was hitherto but the *writ of right*, which meddled not with the unlawful possession, only with the absolute right to the land, and this action, if brought in the *curia regis*, where only impartial justice could be expected, was very dilatory. It was dangerous also, as the tenant in possession might offer battle. In this reign, then, were these *possessory actions* introduced, for the determining the point of possession, leaving the right of propriety as it was. It was advantageous likewise to the subject, both disseisor and disseisee, as it gave him two trials for his lands; for the writ of right when once determined was final and conclusive†.

This distinction between the *right of possession*, and the *right of propriety* was borrowed from the civil law, which was first introduced in the late reign, and was now, and for some time forward, studied with great assiduity by the English, as appears from the many long transcripts from it to be found in the books of our ancient lawyers. There they found the distinction of *actions possessory* and *petitory*; *possessory* when a man had been notoriously in possession, and reputed the owner, and was put out by another of his own authority. The public peace was concerned to protect the possession of the reputed owner, and not to let him suffer the loss thereof while he was suing his petitory action, that is on the mere right, which the other undoubtedly would delay, by all the arts and shifts he could invent. The proceedings, therefore, in possessory actions were summary and expeditious; for they only regarded the possea-

†Ibid.

sion, and did not determine the absolute right : so there was no conclusive wrong done to either party, let the matter of possession be decided how it would; for he that failed might bring his petitory action for the right.

An *assize* in our law was a very summary action. Bracton, who lived an hundred years after, calls it *novum & festinum remedium*, and indeed so *festinum* was it, that, in its proceedings, it seems to depart from the general rules of reason and all laws. For it is a maxim of all laws, except in some few very extraordinary cases, that no proofs are to be taken till an *issue* is *joined*, as our law calls it, or till there is a *contest*, as the civil law expresseth it ; that is, till it is settled what is the matter to be proved, or till there is something affirmed on one side, and denied on the other, upon which the merits of the cause turn. If there be no disagreement about *facts*, but the question is mere *matter of law*, the judges, who are best acquainted therewith, are, by our law to determine. If the question be matters of fact, or facts mixed with law, the jury, assisted with the judges, are to determine ; though if they doubt about the point of law, they may find the facts specially, and leave the law arising thereon to the judges, which is what we call a *special verdict*. No jury, therefore, ought to have been summoned till the defendant appeared, and issue was joined, so that it was known what was the matter to be tried ; and this is the general rule. But, for the speedy settling and quitting possessions, the assize is an exception thereto, as appears from the *writ of assize* directed to the sheriff. For, besides giving notice to the defendant, or *tenant*, as he is called in this action (because he is in possession) the sheriff is immediate-

ly to summon a jury or assize, as it is called upon this occasion, who shall directly go to the place, and make themselves judges, by their view, of the nature, quality, and quantity of the land, or thing demanded, and inform themselves, by all the ways they best may, of the former possession of the demandant, and how he came to lose it. They are then to appear the same day with the demandant and tenant, and, when issue is joined between them, are to determine the matter according to their own prior knowledge, and the evidence then given before them. I observed that this action is not final. A brings an assize against B. If judgment be given for A, B may bring his *writ of right*, if he has the right of propriety, and recover, and so *e contra*. But though B cannot deny his disseising A, he may still defend himself. The words of the writ are *injuste, & sine judicio, disseizivit*. He may therefore shew that he disseised A, justly, that is, that he had a right of entry. As suppose B was first in possession, A disseises him; then B, as he lawfully may, disseises A, A shall not recover. But if B had been in possession, and A's father had disseised him, and died, so that the land has come to A, who is innocent, B, not entering in the father's life-time, has lost his right of possession. It is so in A. Now if B disseises A, the son, though he had ever so good a right to the land, A shall recover the possession; for B had no right to enter, though he had a right to recover the possession he was deprived of by A's father, by bringing an action. Wherever a man comes innocently to a possession, the law will defend that possession, until it is proved that he hath no good right to it†.

† Bracton, lib. 4.

 LECTURE XXXII.

The institution of Judges itinerant, or Justices in Eyre....The advantages attending it....The jurisdiction of these JudgesTheir circuits....The present form of transacting the county business....The division of the Curia Regis into four courts....The jurisdiction of the court of King's Bench.

THE greatest and most beneficial step taken by Henry the Second, was the institution of *judges itinerant*, or *justices in eyre*, as they were called, from the Norman word *eyre*, equivalent to, and derived from the Latin *iter*. I observed before, that almost all businesses relative to the administration of justice were, in the Saxon times, transacted in the county, and hundred, that the leet and manor courts were held in the county, near the suitors doors, and that none but the causes of the great lords, or such as were of difficulty, were handled in the *curia regis*. Under the reign of the Conqueror, I took notice, that the administration of other causes was facilitated in the king's great court; and that consequently, the business of the inferior courts began to decay; and I laid open the motives William had for that conduct, the introduction of the Norman, and suppression of the Saxon law. But the scheme succeeded in the same manner as his other one did, of rooting out the English language, and introducing his own in lieu thereof.

As *this* produced a new language, from the mixture of both, so *that* caused the English law to consist henceforward partly of feudal, partly of old Saxon customs. However, the causes of most persons were still determined in the inferior courts; for they were but few who were able to undergo the trouble and expense of suing in the *curia regis*, especially as all persons, whose causes did not properly belong to the cognizance of that court, were obliged to pay a fine for declining the proper jurisdiction, and for having licence to plead in the superior†.

But by this time the decisions of these courts, where the freeholders were judges both of law and fact, had fallen into great and just disrepute, had occasioned many mischiefs, and were likely to produce many more. The reasons as they are delivered by lord Hale, were principally three: First, the ignorance of the judges in the law: for as the freeholders in general were Saxons, they must be supposed to be entirely ignorant of the feudal law, which was now introduced with respect to titles in lands; or if they did know any thing of it, it is not probable that they would prefer that to their own customs. Nay the Norman freeholders could be of little service in this point, considering their illiteracy, their education being confined solely to arms, as also their frequent absence almost every year to attend their lords in war. With respect to the Saxon law also, it could be little expected that it should be regularly observed, now that the clergy, who only were acquainted with it, were removed, and none of the judges could pos-

† Hale's hist. Com. Law, chap. 7. Dugdale, orig. jurid. p. 27. Hoveden, p. 590.

sibly know more than an illiterate juryman at this day, who could neither read nor write, might be able to pick up by attending a court held once a month. How inadequate such a knowledge would be, even in those times, when the laws were comparatively few, need not be enlarged on*.

It is true, some remedies were applied to obviate the bad consequences of this ignorance ; but they were very ineffectual. It was required that the sheriff, who presided, should have some skill in the laws, but, notwithstanding, he was seldom found to have any ; and if he had, it was not very probable, as he was a Norman, that the jury would pay much regard to his direction in giving their verdicts. As a further remedy to this ignorance, by the laws of Henry the First, the bishop, the barons, and the great men of the court, that is the kings immediate tenants, were ordered to attend. But the bishop, in obedience to the canons, applied himself solely to his ecclesiastical jurisdiction ; and the others were generally in the king's service ; so that they could but seldom attend, and if they did, they could do but little service, being almost all bred to nothing but the sword, and as illiterate as any other set of men.

The next mischief, and which flowed from the former, was, that this bred great variety of laws in the several counties, whereas the intention of the confessor in his compilation, and of his successors afterwards in theirs, was to have one uniform certain law, common to the whole kingdom. But the decisions, or judgments, being made by divers courts, and by several independent judges, who had no common

interest, or communication together touching the laws, in process of time, every several county was found to have several laws, customs, rules, and forms of proceeding ; which is always the effect of several independent judicatories, administered by several judges. And, indeed, this I look upon to be one of the great causes of very many local customs in many parts of England, different from, and derogatory to, the general common law.

But the third and greatest evil, was the frequent injustice of the judgments given in those petty courts; and every business of any moment being carried by parties and factions. The contest about the crown had been carried on with such violence, that one half of the people, all over the kingdom, were professed enemies to the other ; and though both sides, wearied with war, came into the expedient of Henry's succession, and he behaved so that there were no factions against him, yet as to individuals, the sense of past injuries, and the rancor arising from thence, still remained. For the freeholders being the judges, and these conversing with one another, and those almost entirely of their own party ; and being likewise much under the influence of the lords, every one that had a suit there sped according as he could make parties ; and the men of great power and interest in the county did easily overthrow others in their own causes, or in such wherein they were interested, either by relation, tenure, service, dependance, or application. True it is, the law provided a remedy for false judgments given in these courts, by *writ of false judgment* before the king, or his chief justice ; and in case the judgment given in the county court was found

to be such, all the suitors were considerably amerced. Yet this was insufficient for the purpose : For, first, it was too heavy and expensive for many that were aggrieved ; next, it was hard to amerce all for the fault of a few, viz. the jury, who gave their verdict ; and the amercement, though sometimes very severe, being equally assessed, on all the freeholders, was not a sufficient check upon the injustice of some juries*.

The king therefore took a more effectual course ; and, in his twenty-second year, by advice of his parliament, held at Northampton, instituted *justices itinerant*. He divided the kingdom into six circuits, and to every circuit allotted three judges, men knowing and experienced in the laws of the realm, to preside in such cases as were of consequence, and to direct the juries in all matters of law. They were principally empowered to try *assizes*, that is, as I explained in my last lecture, the rights of possession, which had been notoriously invaded in the last reign ; and which, from the continuance of the old parties, could not even, in this reign, be fairly determined in the inferior courts †.

Not that this was their sole business ; for they had in their commissions power to enquire into several other matters, such, particularly, as the king found, by the advice he had received from the several counties, to be evils not likely to be remedied in the county courts. These were, before every commission for justices itinerant in eyre went out, digested under cer-

* Fitzherbert, Nat. brev. p. 41.

† Dugdale, orig. jurid. chap. 20. Madox, hist. of Exchequer, chap. 3. § 10. Bracton, lib. 3, chap. 10, 11. M. Paris, an. 1176.

tain articles, called *Capitula Itineris*, or *The chief heads of the eyre or circuit*, which specified what actions they were to deal with. These were, in general (for the commissions varied at different times, being sometimes more, sometimes less extensive) *civil* and *criminal* actions, happening between party and party; actions brought at the suit of the crown, either for public crimes, or the usurpation of liberties, franchises, or jurisdiction from the crown, which had been very frequent in the former times of confusion; and also the escheats of the king.

The thing I find most remarkable is, that, in these distributions of England into circuits, are omitted some counties, (I do not mean Middlesex, where the *curia regis* sat, or Chester, which was a county palatine, for they of course were not to be included) as particularly Lincoln, in the second eyre; also York, in the second eyre, is but one county, whereas, in the first, it is two, York and Richmond; as in Lancashire also, Lancaster, and Copeland; and Rutland is omitted in both. All which shews, that the limits and divisions of all the counties were not ascertained with precision at that time. The second eyre was instituted three years after the first, by parliament also held at Windsor, and in this there were but four circuits. After these two first, the king appointed the circuits, and distributed the counties at his pleasure.

The usual times of their going was once in seven years. However, they were not stated certainly; for sometimes, if there was a more than ordinary complaint of want of justice, they went every three or four years, and sometimes, if there was no complaint,

they were intermitted beyond seven. Neither was the number of judges sent on the circuits fixed, but alterable at the king's pleasure.

The determinations in these circuits, being under the inspection of men of integrity and skill, were in high estimation, and accordingly are several times quoted by Bracton, as being of as great authority as the decisions in the *curia regis*; and in consequence thereof, the business in the county courts continually declined; justice was every day administered worse in them, and at length they were confined, except in some cases, to pleas under forty shillings. Nay even these were, upon application, easily removable by a writ called a *pone*, into the king's courts†.

But as the hopes of obtaining justice in the inferior courts waxed every day more faint, it was found necessary, during the intervals of the eyres, to substitute other courts in their place. Hence the invention of *justices of assizes, of oyer and terminer of goal delivery*; and the necessity of affairs afterwards obliging these to be sent very frequently, it was thought fit about the end of Edward the Third's reign, to lay aside the justices in eyre, as superfluous, since these others did their business, except as to pleas of the king's forests, where the *eyres* were continued. And, in process of time, to prevent the enormous expense of bringing juries up to the king's courts, the justices of the *nisi prius* were instituted, to try issues joined in the king's courts, and the verdicts so found to return to the court from whence the record was brought; which court, on the record so found, proceeds to judgment. These are the judges who now transact

† 4. Instit. p. 184, 266. Hale, hist. com. law. chap. 7.

the county business in their circuits, under the several commissions before-mentioned ; and going regularly twice every year for that purpose, the whole business they transact is, in common speech, called *Assizes* ; that being, in the ancient times of their institution, the principal part of their employment, though now such actions are scarce ever brought ; personal actions, which may repeatedly be tried, having superseded them†.

About this time, also, it seems that the *curia regis*, the business there increasing, was divided, for the more convenient dispatch thereof, into four courts ; and to each its separate jurisdiction allotted. The exchequer, indeed, was in some sort a separate court before, and had its distinct business of the province ; and in it the treasurer, not the *Justiciarius Angliae*, presided, as he did in the other courts. It is not impossible that, before this time, they had, in the *curia regis*, set apart different days for different kinds of causes. But they were all, in one respect, the same court ; because they had the same judges, namely, all such nobles as attended the court. But this being found inconvenient, as these great men were generally ignorant in law, and business began to increase, it was found proper to appoint settled skilful judges, and to divide the court, and appoint each part its separate jurisdiction. However, those limits were not exactly settled, or, at least, not exactly observed, for some time after : For we find in John's reign, that *common pleas*, that is, civil suits between party and party, and particularly fines of lands, which are of the same nature,

†2. Instit. p. 24. et seq. 4. Instit. p. 162. Selden's notes on Hengham.

were held in the King's Bench ; though, on the contrary, we find no pleas of the crown tried in the court of Common Pleas. I suppose the reason was, that the latter being derived out of the former, the king's bench had a concurrent jurisdiction with it, until restrained by that branch of Magna Charta, *Communia placita non sequantur curiam nostram*. The first of those courts in dignity and power, especially while the *Justiciarius Angliæ* remained, was the *King's Bench*, though of late days the Chancery hath overtopped it. Here, as the king used frequently, in the ancient times, to sit in person, the king is supposed always present ; which is the reason why a blow given in this court, upon any provocation whatsoever, is punished with the loss of the hand, as it is done in the presence of the king. The proper jurisdiction of this court is causes where the king is either directly or indirectly concerned, except as to his revenue.*

In all *pleas of the crown* therefore, that is, suits of the king to punish offences, as indictment of treason, felony, breach of the peace, are proper subjects for this court. He is indirectly concerned in this, that all erroneous judgments, given in the Common Pleas, or other inferior courts, are here reformed ; for the king is concerned to see justice done to his subjects.

Secondly, for the same reason, this is a proper court to grant prohibitions to courts that exceed their jurisdiction, though this is not particular to the King's Bench, but common to all the four courts.

Thirdly, it hath cognizance of all privileges and franchises, claimed by any private persons or corporations ; and if any usurped upon the king in this res-

*Dugdale, orig. jurid. chap. 17.

pect, they are called in, by a *quo warranto*, to shew by what title they claim such privileged. Likewise where any member of a corporation is disfranchised, or removed from, or disturbed in his office, here shall he be remedied. For when a king has given a franchise, he is concerned, in honor and interest; to see that every man entitled, shall enjoy the benefit of it.

Fourthly, the king is interested in the life, limbs, and liberty of every subject. Therefore this is the court wherein appeals, brought by private persons, of murder, felony, and maim, should be tried; and if any man complains of wrongful imprisonment, this court shall, by writ of *habeas corpus*, have him brought into court, with the cause of his imprisonment returned; and if the cause is insufficient to discharge him, or if the offence he is charged with be bailable, to bail him. Nay, this court in favor of liberty, hath a power, in all cases; they may, if they see proper, bail a man for crimes that are not ordinarily bailable by common law.

Fifthly, they have a right to hold plea of all the trespasses done *vi & armis*, though brought principally for a private reparation to the party; for this action savors of a criminal nature, and the king is entitled to a fine for the breach of the peace.

Lastly, it has cognizance of all personal actions brought against persons that have the privilege of this court. The persons privileged are two, first the officers of the court, who are supposed to be constantly attendant thereon, and to whom it would be inconvenient, as well as to the court, to sue or be sued elsewhere; and therefore the privilege extends to suits brought as well by, as against such officers; second-

ly, the prisoners who are in custody of the marshal of the court, and who are consequently not at liberty to appear in any other. These therefore can only be sued here ; for the court will, in such case, order the prisoner up from their own prison to make his defence ; and, under the color of this rule, they now, by a fiction, make all sorts of actions suable in this court ; for it is only alledging the defendant is in the custody of the marshal, though in fact he is not, and that is held sufficient to found the jurisdiction †.

I shall next proceed to the jurisdiction of the high court of Chancery, the second in ancient times, but for some ages past the first court of the realm.

† 4. Institute, p. 70. et seq.

LECTURE XXXIII.

The jurisdiction of the high court of Chancery—The chancellor, a very considerable officer in the Curia Regis—The repeal of letters patent, improvidently issued to the detriment of the King or the subject, a branch of the jurisdiction of the court of Chancery—The Chancery, assistant to the Exchequer in matters of the King's revenue—Other branches of the business of this court.

IN my last lecture, having taken notice, that, in the reign of Henry the Second, the *curia regis* and the *Exchequer*, which dealt with the king's revenue, were distinct courts, and that there were even traces of the *Common Pleas*, as another court, different from the higher court, the *curia regis*; I took occasion to treat of these several courts, and the several limits of their jurisdictions; although the now general opinion be, that these courts were not separated till after the barons wars, that is, not until an hundred years later; which opinion, as I conceive hath, thus far, its foundation in truth, that the precise limits of their several jurisdictions were not perfectly ascertained, and kept distinct till then, though the division had been made before, that is, about the time I am now treating of. For, if it be a good maxim, as my Lord Coke says, *boni judicis est officium ampliare jurisdictionem*, it is not to be wondered at, that, for some time after the

separation, the *Justiciarius Angliæ*, who had the sole jurisdiction in him before, should retain, in many instances, the exertion of it, where, after the separation, the matter properly belonged to another court.

The maxim, indeed, is, in my opinion, utterly false. For where there are separate courts with distinct powers, surely it is the duty of each court, were it only to prevent confusion, to keep within their proper limits. However thus much must be allowed in justification of Lord Coke's maxim, that as it is too much the inclination of human nature, when in power, to grasp at more than is properly our due, so the judges of all courts, and of all nations, have been as little exempt from this infirmity as any other set of men. Witness the outrageous usurpation upon the temporal jurisdiction in ancient days, both by the ecclesiastical judges in the times of the Pope's grandeur, and by the judges of the constables and admirals courts, when supported by arbitrary kings †.

The temporal judges, on the other hand, with a firmness highly to be commended, have successfully not only resisted these encroachments, but, by way of reprisals, have, in these latter days, made considerable incursions into the anciently allowed territories of those courts; not to the detriment of the subject, I must confess; for the method of trial by the common law, is certainly preferable to theirs. But the common law courts have not satisfied themselves with extending their jurisdiction, in derogation of those courts, which they justly looked on, in those days, as enemies to them, and to the laws and constitution of the kingdom, but they have made invasions into each others

† D'Anver's abridgment, vol. 2.

territories, and, by what they call *fictions of law*, have made almost all causes, except criminal ones, cognizable in any court; contrary to the very intention of dividing the courts; which was, that each should have their separate business, and that the judges and practitioners, by being confined in a narrower track, should be more expert in their different provinces†.

In treating of these courts, I began with the *King's Bench*, which, as long as the office of *Justiciarius Anglia* subsisted, was the superior; but since Edward the First discontinued that office, on account of its too great power, and the business of that officer hath been shared between several judges, the rank of this court hath declined, and the *Chancery* hath obtained the first place. To this court, then, I shall now proceed. And as in it there are, at present, and have been for some ages, two distinct courts, one *ordinary*, proceeding by common law, and the other *extraordinary*, according to the maxims of equity, where common law could give no relief; I shall, for the present, confine myself to the former, and defer treating of the latter, until I come to that period when the *Equity jurisdiction* arose.

In the ancient times, before the division of the courts, the chancellor was a very considerable officer of the *curia regis*. It was his business to write and seal with the great seal the *diplomata*, or *chartæ regis*, what we now call *letters patents*; to issue all writs, either for founding the jurisdiction of the *curia regis*, and the bringing causes into that court, that by the ancient law belonged to the courts in the country; or those to the nobles, to summon them to attend the *commune conseil*.

† 4 Institue, p. 79.

ium, or parliament. Afterwards, when the house of Commons was formed, he issued writs to the proper places, for the election of the members thereof. Hence, when the courts were divided, the making out letters patents, the keeping the enrolments thereof, and issuing of *original writs*, as they are called, that is, those that found the jurisdiction of courts and other writs of like nature, continued to belong to him; and, as these records remained with him, there arose to him a jurisdiction concerning them; except as to such writs as were intended to found the jurisdiction of another court, which, though issued from Chancery, were returnable into the proper court, and the cause determined there†.

The first branch of the jurisdiction of this court, then, was the repeal of letters patents, that had issued improvidently, to the detriment of either of the king or the subject; and this properly fell to the lot of the chancellor, as he made out the patents, and kept the enrolments of them. The method of repealing those was by a writ called *scire facias* notified to the party claiming under the patent, and calling him in to shew cause why it should not be revoked. This *scire facias* issued in three cases: the first, at the suit of a subject; where two patents were granted to two persons of the same thing, the first patentee brought a *scire facias* against the second, to repeal his grant; the other two were at the suit of the king, where the king was deceived, either by false suggestions of merit, or as to the value of the thing granted; or, in the second place, if the king had, by his patent, granted what by law he could not have granted. Here, if the case

† Dugdale, orig. jurid. ch. 16. 4 Inst. p. 80.

was clear in law, and there was no controverted matter of fact necessary to be settled, to ascertain the right, the chancellor was judge ; and if his judgment was against the patent, it was his duty to *cancel* the enrolment thereof ; from which part of his office he had his name. I say if the case was clear in law, and there was no controverted matter of fact ; for, if this latter was the case, he could not try it, he being anciently but an officer of the *curia regis*, and not a judge ; and therefore unqualified to summon a jury. The rule continued the same after the separation of the courts, and his becoming a judge ; principally, as I conceive for the preservation of the common law, and the birthright of Englishmen, the trial by jury. For, as the chancellor was almost always, in those days an ecclesiastic, and consequently supposed more attached to the *civil* and *canon law*, there might be danger, if he was suffered to try matter of fact himself, he might introduce a new method of trial. When, therefore, the cause was heard upon a *demurrer*, that is, the facts admitted of both sides, and only the law in dispute, he gave judgment ; but if they came to issue on a fact, he must carry the record over to the King's Bench, who summoned the jury, and gave judgment on the verdict †.

Another branch of his jurisdiction was with relation to the inquisitions of office. There are many officers whose duty it is to take care of the profits and revenues of the king, and to that purpose they are sworn in the Exchequer ; such as *escheators*, *sheriffs*, and others, whose duty it is to make inquiry what the king is entitled to in their respective limits, whether

† 4 Inst. p. 79. 80. 84. 88.

lands or chattles, or by what title. For this purpose they are to summon juries, and to return the verdicts found to the court of the revenue of the Exchequer, in order that that court may take care of the king's rights. These were called *inquisitions*, or *inquiries, of office*, as proceeding from the duty of an officer that made them. But these officers being negligent in the performance of this their duty, it became sometimes necessary, and afterwards customary, to quicken them, by issuing writs for this purpose; and these writs issued out of Chancery, the *Officina Brevium*; and then, that it might be seen they were properly obeyed, the return of the inquisition was made into the court that issued the writ, and thus, the Chancery gained a jurisdiction in this point, and became an assistant to the exchequer in the matters of the king's revenue; not indeed in the administration thereof, but in bringing it into the king's possession †.

It is a maxim in the English law, that nothing can pass from the king to a subject but by *matter of record*, which maxim was not only advantageous to the royal estate, as preventive of persons getting grants by surprise, but also advantageous to the subject in the firmness of his title, when once he had obtained it. And, on the contrary, the regular and equal way of restoring possessions to the crown was by record also, that is, by inquisitions finding the king's title returned, as I have mentioned. But as the verdicts taken in these inquisitions may be erroneous, and detrimental to another person, by finding what was really his property, to have been the property of another, and to have accrued to the king by forfeiture or es-

† 4 Inst. p. 225. 113. 80. 76.

cheat ; and as, regularly, by another maxim of law, there is no averring against or contesting a record, it was necessary that the bare return of inquisition into Chancery should not be final and conclusive, but that time should be given to any that thought himself affected to claim his right. Hence a month's time is given by statute, after the return of the inquisition, in which any person may come in and *traverse the office*, that is, contest the validity of it. And here the chancellor is judge, in the same manner as in the repeal of letters patent, that is, if the subject of the controversy depends merely upon matter of law ; but if the parties come to an issue on matter of fact, he cannot try it, for the reason above given, but it must go to the King's Bench*.

Another Branch of the judicial business is the hearing of petitions to the king for justice in his own causes. No man, by the feudal principles of our law, can bring an action against the king. For the charging him with wrong doing would be a breach of fealty. The king cannot, by our law, do wrong ; but yet, from the multiplicity of his occupations, or from his being misinformed, the subject may sometimes suffer wrong from him. The remedy thereof, in this case, is by humble petition to the king, that he would inquire into the cause, and do justice to the party, which, though conceived in an humbler strain, is as effectual as an action, and must be tried in this court, the proper channel to convey his majesty's graces, and the king, by his chancellor, dispenses justice to the party.

Another branch of the judicial business of this court was the proceeding in certain cases against per-

*4 Inst. p. 155. 79. 206.

sons privileged, that is, the officers of the court, who being supposed to be constantly attendant, were to be sued here, as the officers of other courts, were in their respective courts.

Lastly, this court had jurisdiction with respect to proceeding upon *recognizances*, or acknowledgments of obligations taken in this court, which being here recorded, and not to be removed, were properly here triable*.

There are some other causes proper for the jurisdiction of Chancery, which would carry me too far at present. I shall, therefore, conclude here with mentioning one striking difference between this and the other courts, that they sit only in the times of the four terms, whereas it is open all the year. The confining the others to the terms arose from the religion of the times, and the inquisitions of canon law, which forbad courts to be held during the seasons of the three great festivals, and of harvest. In obedience to this law, I may say (for the papal power was then very high in England) was our Michaelmas vacation set apart for the solemnization of Christmas, the Hilary vacation for Easter, the Easter vacation for Whitsuntide, and the Trinity or long vacation, for the uses of husbandry. But great would be the evils, if that court which is the *Officina Justitiæ*, the Shop of Justice, were to be ever shut. Writs, therefore, issued hence at all times, and all such causes as, for the public good, cannot brook delay till the ordinary times of sitting of other courts, are here handled in the vacations, such as to mention a few, *habeas corpus*'s and

*4 Inst. ch. 8. Bacon, hist. and polit. discourse, part. 2. ch. 18.

homine replegiandó's, to restore persons imprisoned to liberty, prohibitions to keep the inferior courts within their proper limits ; and *replevins*, to restore the possession of goods distrained.

But the great business of this court, as a court of common law, was, that it was the *Officina Brevium*, the shop where original writs were purchased by suitors, in order to commence their actions. An *original writ*, in the most common form, is an order to the sheriff to summon the party complained of to do justice to, or else to answer to the complainant in the proper court ; containing a short description of the complainant's title, and the wrong done to him, from whence, in Latin, it is called *Breve*, and answers to the original citation in the Roman and ecclesiastical laws. This, and the making out patents, was the principal business of the chancellor in the *curia regis*, and therefore naturally continued with him after the division of the courts. The reasons assigned by Gilbert for having one of these superior courts a public shop for justice, are three ; first, that it might appear that all power of judicature flowed from the crown ; secondly, that the crown might not be defrauded of the fines due to it for suffering persons to desert the inferior courts, and to sue for justice immediately from the king ; and lastly, to preserve an uniformity in the law ; for these writs being made out in one constant form contributed greatly thereto, being both a direction to the judge, and a limitation of his authority.

Originally, the chancellor heard the complaints of the person injured, and formed a writ according to the nature of the case, but as, among a rude military peo-

sons privileged, that is, the being supposed to be pursued here, as the office of respective courts.

Lastly, this court proceeding upon obligations to be recorded, and made triable*.

There are in the present situation of the law, the Chancellor's business became devolved upon the Chancellor's Clerici, as they were anciently, or the Masters, they are now called, of Chancery; and they were restrained from making out any of a different kind from those in the Register. However, as in the progress of time, cases would happen which none of the forms in that book would suit, and it was looked on as the corner-stone of the law, the Chancellor could not of himself venture to make out new and unusual writs, but referred the complainants, in such cases, to petition the parliament for remedy †.

These petitions afterwards growing too frequent, and interrupting the public business, it was found necessary to enlarge the power of the Masters of Chancery, and to give them a qualified power of forming new writs. This was done by the statute of Westminster the second, cap. 24, in Edward the First's reign; it runs thus: *Quotiescunque de cetero evenierit me cancellaria, quod in uno casu reperitur breve, & in*

† Baron Gilbert's history of the Court of Common Pleas. Madox, hist. Excheq. ch. 2. sec. 9. 2 Institute, p. 53. 407.
 ‡ Institute, ch. 8.

*simili casu cadente sub eodem jure; & simili indid-
remedio, non reperitur, concordent clerici de can-
aria in breve faciundo, vel attermiment querentes in
roximum parliamentum, & de consensu jurisperitorum
fiat breve ne contingat de cetero, quod curia domini re-
gis deficiat conquerentibus in justitia perquirenda;*
which last words, *ne contingat*, &c. gave a handle as
I shall shew hereafter, to this court to erect their
equitable jurisdiction*.

We see how this power given to the Masters was limited: it must be exercised only in cases parallel to such as there was a remedy already provided for; all the Masters must agree in the form of the new writ; and the remedy must be the same as was in the similar case in the Register. To illustrate this by the example of the first writ formed by the Masters upon this statute, and which therefore, by way of eminence, is called a *writ, in consimili casu*. The statute of Gloucester ordered the Chancery to form a writ for the relief of the person in reversion, where a tenant in power had aliened her dower. The writ was accordingly framed, and inserted in the Register. Now, by virtue of this statute of Westminster, the Masters framed the writ *in casu consimili*, in favor of the person in reversion, where a tenant by the courtesy, or tenant for life, had aliened, he being equally damaged as the former case. But though this was particularly called *a writ, in casu consimili*, there were many others formed by virtue of this statute, such as for various kinds of trespasses unknown in former ages, and actions upon the case, so frequent in these our days, and so called, because the writ is formed ac-

ording to the circumstances of the case, and not upon the old forms continued in the Register.

This new employment of Masters in Chancery, and the business of the court increasing, created a necessity of erecting new officers, to make out the *brevia de cursu*, namely, those in the Register, who were therefore called *Curritors*. The chief of the Masters is *Keeper of the Rolls* of this court, which was formerly a part of the chancellor's business ; and he is therefore called *Master of the Rolls*. For ages past, since the Equity business multiplied in England, this officer has been there, in matters of equity, an assistant judge to the chancellor, but his decrees are liable to a rehearing, and to be reversed by the chancellor. But in this kingdom, the office hath not had any judicial authority annexed to it.

 LECTURE XXXIV.

The court of Common Bench or Common Pleas—The jurisdiction of this court—Actions real, personal, or mixt—The court of Exchequer—The jurisdiction of this court—Exchequer chamber—The judicature of Parliament.

THE next of the superior courts, is the *Common Bench*, or *Common Pleas*, as it is more commonly called, being the proper court for the determining suits between subjects, wherein the king is not concerned ; and upon the multiplication of business in the *curia regis*, it was separated from it, for the more speedy and easy dispatching the affairs of the people. As in the very old times the king often sat in person in the *curia regis*, and that he might have an opportunity of so doing when he pleased, that court always followed the king wherever he went within the kingdom of England ; and in those days it was customary for the kings to take progresses ; and reside in the different seasons of the year in different parts of the kingdom, as we see, by the variety of places where the parliaments were held in old times. The same practice of the courts and the records following the person of the king, continued in France longer than in England.... For when king John was taken by the black prince at the battle of Poitiers, the ancient records of that kingdom were lost, and there are scarce any now re-

maining there, of what had passed previous to that time, except enrolments made since, of the ancient charters that were in the hands of the subjects.

But in England the constant removal of the courts was found very burdensome to the people, who had suits much earlier. For their ease, therefore, it was enacted in *Magna Charta*, that *communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco*; that the Court of Common Pleas should no longer be ambulatory, but held in one certain place.... Westminster was the place fixed upon, and there, if we except some occasional removals, on account of epidemical sicknesses, hath it been held ever since.... And in long space of time after, the other courts became, though not in pursuance of any positive law, fixed there also. By their becoming settled in a certain place, one great inconvenience, besides the hardships on the suitors, was avoided, namely, the loss and embezzlement of the records by these frequent removals. For it is very remarkable, that there is not a record remaining of the times previous to the fixing of the courts, not even the enrolments of the acts of parliament themselves, except a few, and a very few, of the courts of Exchequer, which, concerning the king's revenue, were more carefully preserved*.

But the greatest advantage that attended this change was the improvement of the law, and, what was a consequence thereof, the preservation of the liberty of the subject. For now it became much more convenient for persons to apply to that study, when they were no longer under a necessity of removing....

*2. Institute, p. 21. 22.

And we therefore, soon after, find the practitioners of the law settled together, something in a collegiate manner; and after the dissolution of the order of Knights Templars, the habitation of these latter, called the *Temple*, was granted to them for their residence and improvement. Here they continued to confer the degrees of *Apprentices* or *Barristers at law* and *Serjeants at law*, which they had began before, in imitation of the bachelors and doctors degrees in universities.

The preservation of the liberty of the subject was, as I said before, another happy consequence that resulted from the fixing the courts, and the uniting the professors of the law into one body. For as, about this time the study of the civil and canon laws was eagerly pursued by the clergy in the universities, and the English Customs as much depreciated by them as possible, and as those two laws were founded on maxims of despotism, and, as such, encouraged and supported to the utmost by the popes, and all kings that aimed at arbitrary power, the common lawyers were necessitated, for the support of their profession, to take the popular side of the question, and to stickle for the old Saxon freedom, and limited form of government.

Hence the steady opposition they made, even in those early times, to the king's dispensing. Nay, they carried their zeal for liberty so far, as (since they could not directly, in those days, oppose the weight of civil law) to quote the very passages of it that were in favor of absolute power, and by their glosses make it speak the language of liberty. Thus Bracton quotes the text: *Quod principi placet, legis habet vigorem;*

that is, in its true meaning, the monarch is sole legislator : but Bracton's comment is, *id est, non quicquid de voluntate regis temere prescriptum fuerit, sed quod concilio magistratum suorum, rege auctoritatem præstante, habita super hoc deliberatione & tractatu, recte fuerit definitum* ; that is, the king is not sole legislator ; directly contrary to the sense of the very text he quotes. And it must be allowed, to the honor of the common lawyers, that, with the exception of a few venal time-serving individuals, they have, for a succession of ages proved themselves true friends to a rational civil liberty in the subject, and to a reasonable power and prerogative in the king†.

To come to the jurisdiction of this court. Its proper business as appears from its name, is to take cognizance of all *common pleas*, that is, all pleas that are not pleas of the crown, or at the suit of the king. With these it cannot meddle ; for all actions at the suit of the king for criminal matters, belong to the King's Bench, as those for his revenue do properly to the Exchequer. But it hath jurisdiction, and that universally, throughout England, in all civil causes, whether *real, personal, or mixt* ; the distinction of which it will not be amiss just to point out.

Real actions are those that are brought to recover land itself, where the claimant has a right to an estate in it for life at least ; and these, until within these two hundred and fifty years, were the only ones used for that purpose ; but, since that time, they are gone almost entirely out of use, on account of their nicety, their delays, their being conclusive ; and their place is sup-

† Bracton, lib. 1. cap. 1. Fortescue de laud. leg. Angliæ, cap. 34.

plied by mixed actions, which are easier, shorter, and may be tried again. However, if any one was inclined, at this day, to bring such an action, this is the court to bring it in ; and therefore all *common recoveries*, which anciently were, and still carry the form of, real actions, are suffered in this court.

Personal actions are those that are brought for the recovery either of some duty, or demand in particular, or of damages for the non-performance of some promise or contract, entered into ; or lastly such as are brought by a man to recover a compensation in damages for some injury sustained in his person—or property. To give but one or two instances of these last : If my ground is trespassed on, if my person is assaulted, my reputation injured, the remedy is by the personal actions of *trespass, assault and battery* or *slander*. All actions for breach of covenants are likewise personal actions ; for, by the common law, damages only are recoverable thereon, and the party is not obliged to perform the covenant. Wherefore, if a man chuses rather to have his covenant performed than receive a satisfaction in damages, he must go into a Court of Equity, which will oblige a man to perform in specie, what he hath specifically engaged to perform, if the performance is possible. This court therefore, being the proper court for personal actions, fines of lands are levied here ; for they are fictitious actions, founded on a fictitious breach of covenant.

Mixed actions are designed for the recovery of a specific thing, and also damages, and consequently partake of the nature both of real and personal actions. For instance : If a tenant for life, or years, or at will,

commits waste, he forfeits to the owner of the inheritance the place wherein the waste was done, and treble damages. The *action of waste*, therefore, being brought to recover both, is a mixed action. The action of *ejectment* also, which was originally proper to recover damages for being put out of lease for years, but is now the common remedy, substituted in the lieu of real actions, is now of the same nature; because both the land itself, and damages for the wrong are recovered†.

These three kinds of actions are properly the business of this court, though, as to the two last, actions personal and mixed, the courts of King's Bench and Exchequer have, by fictions, gained a concurrent jurisdiction with this court; the King's Bench, by supposing the defendant to be in the custody of the marshal thereof; and the Exchequer, by supposing the plaintiff to be a debtor to the king.

The proper way of founding the jurisdiction of this writ, is by a writ out of Chancery, returnable hither, either to begin a cause originally here, or to remove one depending in an inferior court not of record; but, in some cases, they proceed without any writ from Chancery, as in causes brought by or against an officer of the court, and likewise, in granting prohibitions to other courts that attempt to enlarge their jurisdiction.

Before I conclude, I must observe, that this court, though one of the four high courts derived out of the *curia regis*, is not, however, supreme, but subordinate to the King's Bench. For judgments given therein are reversible in the King's Bench, by a writ of error

† Baron Gilbert, Hist. of the Court of Com. Pleas. 4 Inst. ch. 10.

issuing from the Chancery, suggesting the king's being informed that manifest error has intervened, and commanding the record to be transmitted into the King's Bench ; the judges belonging to which, upon the face of it, and nothing else, are to affirm or reverse the judgment ; for the error must be manifest ; and no error in point of fact, but error only in point of law, can be averred against a record.

The lowest in rank of the four great courts, though from ancient times one of the greatest importance, is the court of *Exchequer*, whose business was to collect in the several debts, fines, amerciements, or other duties or properties belonging or accruing to the king, and likewise, to issue money by his orders ; and this court being originally solely erected for the king's profit, is the reason, I presume, why it is held in rank the lowest ; it being more honorable to the crown to give precedence of rank to those courts that were intended for the administration of justice to the subject, above that which was intended merely for the king's temporal advantage. Besides, this court was, in its original, distinct from the *curia regis*, the treasurer being the judge in this, as the *justiciarius Anglia* was in the other ; and therefore, it was regular, that the Chancery, and Common Pleas, as having been once part of the supreme court, should take place before this. Its having been originally a distinct court, accounts for its independency on the King's Bench ; for no writ of error lies from it to the King's Bench, as doth from the Common Pleas, but its errors are rectified in another manner*.

This court, as well as the Chancery, hath, properly

* 2d. Inst. p. 196. 197. 255. 551.

speaking, two courts : one, ordinary, proceeding according to the strict rules of the common law ; the other, by equity ; for, as it is the king's duty to render justice with mercy, so in this court, the rights of the king are not always exacted with rigor ; but, on circumstances of reason and equity, may be mitigated or discharged. The court of common law in this court had anciently much more business than of late. Originally, whilst the royal demesnes were unalienated, they had the setting of them for years ; but, afterwards, people chusing rather the authority of the great seal, took them in Chancery. That court, as I mentioned when treating of it, had likewise gained the returns of inquisitions of office, and had also gained by act of parliament, the composition of forfeitures, for the king's tenants *in capite* aliening their lands without license ; which, otherwise, would have belonged to this court. The erection of the *Court of Wards*, also, by Henry the Eighth, took off that branch of its jurisdiction ; and the abolishing of the military tenures by Charles the Second took away the business of calling in their fruits. The erecting the office of *the Treasury*, as distinct, for the issuing of money, had the same effect ; but, above all, the erecting new jurisdictions, and appointing new judges to try causes relative to the new taxes, as the Commissioners of the Customs and Excise, and Commissioners of Appeal, diminished the peculiar business of the court†.

It will be now proper to consider the nature and extent of their present jurisdiction. Here then are sworn the sheriffs, and other officers concerned in the

† 4th Inst. ch. xi.

king's revenue and duties ; and here they are to return, and make up their accounts. Here, likewise, the king sues his debtors, or even the debtor of his debtor (for so far his prerogative extends ;) and here also, for enabling his debtors to pay him, they are privileged to sue their debtors ; an allowance that hath grown up by degrees to extend the jurisdiction of this court, and to make it concurrent with the Common Pleas. For it is only alledging, (and this they will not allow to be traversed or denied) that the plaintiff is the king's debtor, and the business is done. The court acquires immediate jurisdiction. The same allegation is likewise necessary, when a suit of equity is commenced in this court ; for otherwise, the suit would, on the face of it, appear to belong to Chancery. I need scarce observe, that the officers of this court are to sue and be sued here ; for that is a privilege common to the officers of all the courts, arising from their personal attendance. Here likewise, the king's attorney-general exhibits informations for concealment of customs and seizures, informations upon penal statutes, where there is a fine due to the king, forfeitures and breach of covenant to the king ; likewise all informations for intrusions, wastes, spoils or encroachments on the king's lands ; in general where the crown suffers in its profits.

In this court of common law, the *Barons of Exchequer* only are judges, and are called *Barons*, because anciently none were judges there under that degree. In the Court of Equity, the chancellor of the Exchequer is joined with them, though it must be owned this officer hath seldom, of late years, acted either in England or Ireland, in his judicial capacity, and it hath

been considered little more than as a great lucrative place. Errors in this court are not, as I observed before, redressed in the King's Bench, as those of the Common Pleas are, but in another court, called the Exchequer Chamber, consisting of the lord chancellor, lord treasurer and chief judges.

There is another court of *Exchequer Chamber* in England, tho' we have none such in this kingdom, erected 27th Eliz. and composed of the judges of the Common Pleas and barons of the Exchequer, in which lies a writ of error from the King's Bench, to reverse judgments in certain suits commenced there originally. Into this court are frequently removed, or adjourned from any of the other courts, causes that are of a new impression, and attended with difficulty, or even such concerning which the judges, perhaps, entertain no great doubts, but are new, and attended with extensive consequences ; and this, for the more solemn determination, that all the judges of the courts might be consulted about establishing a new precedent. Anciently such causes were adjourned into parliament, but the legislative business of that high court increasing, this court was substituted for the above purpose of consultation*.

To finish this account concerning the superior courts at once, it will be proper to say something of the supreme judicature of all, that of parliament... Anciently, as I have frequently observed, all causes but such as concerned the king or peers, or those that were of great difficulty, or such as justice could not be expected in by law, were dispatched in the county courts, the rest by petition to the king in par-

* 4th Inst. ch. 13.

Justices, or in the intervals thereof, in the *curia regis*, which originally was but a committee thereof, appointed by the king. Hence matters determined there, were subject to a review in parliament; writs of error from the King's Bench returned there; and when the Equity courts grew up, appeals from the Chancery and Exchequer in matters of equity. This power of judicature is peculiar to the lords (for the parliament consisted at first only of them, and when the commons were introduced, they sat in a distinct house) and the parliament hears at present only matters that come from other courts by appeal, or by writ of error, which is in the nature of an appeal, and no causes originally. It is true, that, for a long time after the division of the courts, many causes by petition were brought into parliament in the first instance; but these being generally referred to the courts below, the practice ceased, and would not now be allowed. For a long time accusations against peers were originally admitted, but at present, and for this long time, indictments found below are required before a peer can be tried; nor can the trial of peers by impeachment in parliament be considered as an original trial, for the commons are considered as the grand inquest or grand jury of the whole nation, and therefore an impeachment by them is not only equivalent to, but has and ought to have greater weight than any indictment by any private grand jury.

In this judicature of the lords, an impeachment there, is one singularity, an exception to the grand rule, that every man is to be tried by his peers, and that is, that a commoner impeached by the commons shall be tried by the lords. The reason of this pro-

cedure seems to be, that all the commons of England are supposed parties to the accusation, when their representatives have accused him, and it might be dangerous to trust his life with a common jury ; but the lords are strangers to the charge, and it is their interest to control the commons, if they proceed with too great violence*.

* Hales of the power and jurisdiction of parliament. Selden of the Judicature of Parliament. See his works vol. 3. 4. Inst. ch. 1.

LECTURE XXXV.

Henry II's dispute with Becket—The constitutions of Clarendon—the murder of Becket.

HAVING, in a general manner, run through the jurisdictions of the several great courts of the kingdom, which were divided from each other about the time I am now treating of, though the division was not completed, nor the several limits exactly adjusted till some time after ; I shall proceed, in a summary way, with the few remaining observations I have to make, with respect to the state of the law during the reign of Henry the Second. And the greatest and most remarkable of these was his dispute with Becket, archbishop of Canterbury ; a contest attended with the most fatal effects, and which makes up a considerable part of the civil history of that reign. The particular circumstances that attended it, and the many turns it took, I shall not dwell on ; but, as it arose from the clashing of contrary laws, I shall briefly lay open its source, and give an account of the events.

From the year of Christ one thousand, the popes had every day been increasing their power, and extending their pretensions. They set themselves up, at first, as protectors of the clergy, who really had been oppressed by the temporal princes, and in order

to attach them more firmly to their interests, they made canons in councils, and published decretal epistles, by their own sole authority ; which, in those days of superstition, were too readily received as laws ; all tending to depress the civil power, to raise the ecclesiastical on its ruins, and, in short to pave the way for making the pope supreme monarch of the world, in matters temporal as well as spiritual. The emperors, however, stickled hard, on the other hand, to support their rights, and particularly to maintain to themselves the nomination of the popes, as well as of other bishops, which the popes had transferred to the people of Rome first, and afterwards to the clergy alone ; so that, for a good part of this time, there was a schism in the church, and two popes in being, the one named by the emperor, and the other elected ; and I observed before, William Rufus kept himself independent by acknowledging neither, and was absolute master of the church. However, the popes that were elected generally gained ground. They had the majority of the clergy on their side, and indeed most of the sovereign princes of Europe, who were jealous lest the Emperor, under pretence of being successor to the Romans, might arrogate a superiority over them.

It is surprising, yet very true, that, in these contested times, the papal power was pushed very near its greatest height. The materials, indeed, were formed and collected some time before. A multitude of fictitious decretal epistles had been forged in the names of the ancient popes, so early as from the year 800, all tending to exalt the bishop of Rome, as head over the church universal ; but these were not as yet generally

known and received as laws, the church being hitherto governed by collections of canons made by private persons, out of the canons of the general or provincial councils and sayings of the fathers. But in the reign of our Stephen, the mighty fabric began to be reared, and to take a regular form. Gratian, a Roman courtier, undertook to make a new compilation of ecclesiastical laws, and published it under the name of *Decretum*, which is now the first volume of the canon law: this is a motley composition, digested under distinct heads or titles, of rules and decisions, collected from the sayings of the fathers, canons of the councils, and, above all, from the decretal epistles of the popes, (the modern ones real, the ancient ones forged) and was put together principally for the two great purposes, of aggrandising the See of Rome, and exempting the clergy from lay-jurisdiction. And, for that purpose, not only forged epistles and canons have been inserted in it, but the real canons and writings of the fathers have been, in many places, falsified by adding or omitting words as best served the purpose proposed; and that this is the case of Gratian's work, the learned Papists themselves confess, in many instances.... However, in that ignorant age, it passed easily all for genuine. But the popes, wisely considering, that, if it was canvassed, it would not bear a strict scrutiny, never chose to give it an authentic testimony of their authority, but contented themselves with authorising it to be read in universities. In the interval I have mentioned, the popes began to turn their spiritual arms of excommunication or interdict, that is, forbidding the administration of divine offices, except in *ar-*

ticulo mortis, in a country or district, to temporal purposes, and the support of their grandeur*.

On this state of affairs happened the quarrel between the archbishop and Henry, which embroiled him with the pope, embittered his life, and was attended with consequences that brought him to the grave with sorrow. At this time there were two popes, Victor, confirmed by the emperor, and Alexander, the most enterprising pope the world had yet seen, supported by the king of France. Had Henry followed the example of William, and acknowledged neither, he might have kept both in awe, and vindicated the rights of his crown with success. But he was prevailed upon by Lewis of France to recognize Alexander, who was afterwards made an instrument of humbling Henry, of whose power that monarch was jealous. For his extreme partiality and severity is, in part, to be ascribed to the influence of his protector, as well as to his zeal for ecclesiastical immunities. These immunities had grown to an excessive height, and, under the pretence that no man should be twice punished for one offence, the bishops took care to inflict penance on ecclesiastical offenders, and then refused to suffer them to be tried by the laws of the land ; so that the most profligate ruffians crowded into the lower order, and committed with impunity (except penance, or rather, a pecuniary commutation for it) what murders, rapes, and robberies, they thought fit. Henry was sensible of those enormities, and, in hopes of curing them by the assistance of one highly obliged to him, got Becket, who was lord chancellor, his favor-

*Giannone's hist. of Naples, b. 1. Bower's hist. of the Popes, vol. 1.

ite, and indebted to him for his grandeur, promoted to the See of Canterbury. But he soon found how much he was mistaken in his man. Becket had been bred in his youth in the study of the ecclesiastical laws, and, though he had in all things hitherto complied with the king for his advancement, was, at the bottom, strictly attached to his order and its privileges, and resolved, at whatever price, rather to extend than diminish them.

To dazzle the people, he threw aside the pomp and expensive life of a courtier, and assumed the character of mortification and sanctity. He began by reclaiming the estates belonging formerly to his see, though they had been aliened by his predecessors, with the consent of their chapters, and upon valuable consideration; and this under pretence of a canon, made a year or two before by Pope Alexander, in a packed council at Troyes in France; which was plainly saying, that an ecclesiastical canon might repeal the laws of any country, and subvert its constitution. He made an attempt likewise on the patronages of laymen, and appointed a parson to a church, which belonged to one of his own tenants, and afterwards excommunicated the tenant for turning this parson out, although he was the king's tenant *in capite*; and such, by a law of the conqueror, were forbid to be excommunicated without the king's leave, under the penalties of treason. This was a very necessary law; as otherwise a bishop might, by his sentence, deprive the king of his service, and that of as many military tenants as he pleased. However, in this point, when he found he was in danger of being prosecuted on the law, he relented, and absolved the gentleman*.

*Lord Lyttleton's hist. of Henry II. b. 3.

His screening of criminals was exercised also in the most shameful manner. A lewd clerk had debauched a young lady, and afterwards publicly murdered her father, and this criminal was refused to be given up to be tried. Another was guilty of sacrilege, in stealing a silver chalice out of a church, and *Becket* would not suffer him to be tried by the laws of the land.... However, as the offence concerned the church, and was therefore of a very heinous nature, he tried him himself; and having found him guilty, branded him with a hot iron, in defiance both of the English and canon laws, neither of which allow such punishments to an ecclesiastical judge. But he knew he was too faithful a servant of the pope, to be called to an account even for making free with his own law.

Henry, finding it necessary to stop the prelate's career, summoned an assembly of the bishops, and demanded of them that they should degrade all ecclesiastical murderers, and deliver them over to the secular arm. At first the majority seemed to think this a reasonable proposal, as they must, in the first place, find them guilty before they were to be given up. But *Becket* brought them over, by representing, that, by the canon law, they were not to be concerned in matters of blood, and that their delivering over any criminal to capital punishment would be infringing thereof. They therefore refused the king. He then demanded whether they would observe the laws and customs of the kingdom. Their answer was, in all things that did not interfere with the rights of their order. The king left the assembly in wrath, and at length, *Becket* was, by the intreaties of the other bishops, and even of the Pope's legate, who knew his

master, being embroiled with the antipope, was not able, at this time, to support him, prevailed with to wait on the king, and promise to observe the laws of the land without any reservation †.

Henry, sensible that such a general promise, when particular facts arose, might be explained and evaded, was resolved that the limits of the ecclesiastical jurisdiction should be ascertained in such a manner as would leave no room for subterfuges ; and to that end called a parliament at Clarendon, wherein Becket and the bishops swore to observe the laws there made, called *constitutions*, as new laws, but declared to be the old laws of the realm. These constitutions were in number sixteen. I shall mention a few of the principal, in order to give a notion of the points of jurisdiction then contested between the spiritual and lay courts. First, then, it was declared, that suits about presentations to livings belong to the king's courts ; that clergymen should be tried for temporal crimes in the temporal courts ; and that, if they pleaded guilty, or were convicted, they should lose the ecclesiastical privilege ; that no clergyman should quit the realm without the king's licence, nor attain it, without giving security to attempt nothing to the prejudice of the king or kingdom ; that no immediate tenant, or officer of the crown, should be excommunicated without the king's licence ; that appeals in ecclesiastical causes should be made from the arch-deacon to the bishop, from the bishop to the archbishop, from the archbishop to the king.

This indeed was striking at the root of the Pope's supremacy, and of his profits too. It was in truth

† Daniel, ap. Kennet. Carte.

declaring the king supreme head of the church as to jurisdiction ; next, that all that held ecclesiastical dignities by the tenure of baronies, should do the duty of barons, and among the rest sit in judgment as barons ; however with this favorable allowance to them, in consideration of their being bound by the canon law, that they might retire when the question was to be put about loss of life or limb ; likewise that no bishop, or abbot, should be elected without the king's consent ; nor, when elected, be consecrated till they had first done homage and fealty ; that the spiritual courts should not hold plea of debts due upon oath ; and lastly, that the spiritual and temporal courts should mutually aid each other in carrying their sentences into execution†.

Such were the most material of the famous constitutions of Clarendon, drawn from the ancient practice and law of the kingdom, which the Pope afterwards declared null and void, as contrary to the rights of the holy church ; which was plainly assuming the supreme legislature in every thing that had the most distant relation to a church, or a churchman. But Becket, who had sworn to obey the old laws only, for fear of personal danger at that time, did not wait for the Pope's condemnation of them, but instantly showed he was resolved to disobey, by enjoining himself penance, and abstaining from officiating till he could obtain the Pope's absolution. Henry, provoked to the uttermost, was now resolved to crush him. He called him to an account in parliament for all the

† Hoveden, edit. Savil. 494—549. Mat. Paris. an. 1164. Lord Lyttleton's hist. of Henry II. book 3. Brady's history.

king's monies that had passed through his hands while he was chancellor, and for one thousand marks he had lent him ; demands that the king had never intended to have made, but for his refractoriness ; and which he well knew he was not able to pay, having embezzled them in high living.

The archbishop resolved to stand out to extremity : he offered a most wonderful plea in a cause merely civil, that of debt, viz. that his being made archbishop of Canterbury, had discharged him of all former accounts and debts, and appealed, even in this purely civil cause, to the Pope. When reproached with contravening the constitutions of Clarendon, contrary to his oath, he broached another curious maxim, That, in every oath a clergyman could take, there was a *tacit salvo* for the rights of his order ; he forbade the bishop to sit in judgment upon him, under pain of excommunication. He would not hear his sentence, but told the peers that he was their father, and they his children, and that children had no right to sit in judgment on their father. He then departed, in contempt of the court, and went over to France, where he was kindly received by that king ; and the Pope avowed and encouraged him in all the extravagances he had advanced, received his appeal, and annulled all sentences against him.

However, as the schism was not yet ended, he kept him in for some time from proceeding to extremities ; but as soon as the danger was over, the Pope suffered him to thunder out his excommunications against all the ministers of the king, and all that observed the constitutions of Clarendon. The king himself, indeed, was spared, and the kingdom was not, on this

occasion, laid under an interdict ; a circumstance then much apprehended. The king, on the other hand, enacted, that no appeals should be made to the archbishop, or Pope ; that the lands belonging to Becket should be confiscated ; that the clergy who resided abroad should return in three months, or forfeit their benefices ; and that no letter of interdict should be brought into England, the penalty of which last was afterwards made the same as of treason.

The king was not a little uneasy at the apprehensions of personal excommunication, or of an interdict's issuing, as he observed the censures already passed had but too much influence on the weakness of many of his subjects. He therefore, to ward the blow, had recourse to negotiation, which the Pope readily admitted, who feared, on the other hand, from the popularity of Henry's and the unpopularity of Becket's conduct, that his ecclesiastical thunders might be slighted in England. He contrived, however, in the interim, to embroil him with the king of France, and other powers on the continent. Matters continued on this footing for some years, in a train of negotiation ; in the course of which the moderation of the king, and the insolence of the archbishop, were equally remarkable, till, at length, the former, finding the Pope had trodden down all opposition, and that his own interest was on the decline, was obliged, I may say, to submit ; for he was reconciled to Becket ; engaged to restore his and his adherents' effects, and to suffer him to return to England, which he did with the additional quality of legate of the Pope ; and no mention was made of either side, of the subject of the dispute.

But Becket was resolved to show the world he had conquered. He began the exercise of his legatine power, by suspending and degrading the clergy, and excommunicating the laity that adhered to the laws of the kingdom. Nay, he excommunicated two of the king's tenants for cutting off the tail of his sumpter mule ; so sacred was the beast become.

Soon after he was murdered at the high altar, in consequence of a rash speech of the king, in a barbarous manner, as all, any way acquainted with the history of England, must know ; and now was Henry completely at the Pope's mercy. For Becket, dead, served the See of Rome more effectually than he ever could have done living. The bloodiness of the fact, the sacredness of the place where it was committed, and the resolution with which he died, filled not only all England, but all Europe, with religious horror. Miracles in abundance he immediately wrought, and he who by many was looked upon as a traitor, was now universally esteemed as a saint and a martyr ; and so he was to the interest of the See of Rome.

In these circumstances Henry was obliged to submit to be judged by the Pope's legates, who, at length, absolved him, on his swearing that he had not willingly occasioned the murder, and that he felt great grief and vexation on account of it ; in which, no doubt, he was sincere. But before he could obtain it, he was obliged to promise to be faithful to Alexander and his successors, not to interrupt the free course of appeals to Rome in ecclesiastical causes, and not to enforce the observance of evil customs introduced since his accession to the throne ; for so

they stiled the constitutions of Clarendon, though they were only declarations of the old law. And thus ended this famous contest, in an absolute victory on the side of the Pope†.

† Hume, Carte, Lyttleton, &c.

LECTURE XXXVI.

The rebellions of Henry's sons....He is succeeded by Richard I.....The steps taken at this period towards settling the succession to the kingdom....The laws of Oleron.....Accession of John....His cruelty and oppressions.

HENRY's quarrel with the Pope, terminating in the manner it did, necessarily weakened the weight and influence he ever before supported, both in his own kingdom, and on the continent; nor could the unwearied pains he afterwards took, in redressing grievances, and making salutary laws, by the advice of his parliament, restore him to the consequence he had lost. The rest of his life was spent in unfortunate wars with his rebellious children, instigated thereto by the artful Philip of France. And the pretence was grounded on a step that Henry had taken in favor of his children, and I may add of his people, that of bringing the crown to a regular course of succession, and by that means preventing contests upon a vacancy. Hugh Capet, the first of the present race of French kings, who came to the throne by election, in order to perpetuate it in his family, invented that practice which his successors followed for near three hundred years, of associating the eldest son, by causing him to be crowned in the father's life-time.

Henry, who loved his children, and was sensible

that the not following this practice in England had occasioned the wars between William and Henry the Conqueror's sons, and their brother Robert, as well as those between Stephen and himself and his mother, crowned his eldest son Henry. But the use which the ungrateful prince made of his advancement, was to embroil his father, by demanding the immediate cession of Normandy, on pretence that, being a king, he should have some country given up immediately to govern. Upon young Henry's death, the father, who knew Richard, with greater capacity, was equally unnatural with his elder brother, resolved not to give him the same pretence to trouble him, and refused obstinately to have him crowned ; but this refusal served itself for a pretext for rebellion, as it gave Richard room to think, or at least to pretend to think, that his father intended to disinherit him, and to settle the crown on his youngest and favorite son John. In this rebellion Richard, assisted by the king of France, and many of Henry's subjects, who probably suspected Henry's design was such as was suggested, prevailed, and the father was obliged to engage that his subjects should take the oath of eventual allegiance to Richard, and soon after died of a broken heart, occasioned by the undutiful conduct of every one of his sons.

Richard accordingly succeeded ; during whose reign we have little to observe concerning the laws, the whole time of it being spent in a continual state of war, either in Palestine or France. Enormously heavy indeed were the taxations his subjects labored under, and yet they bore them with cheerfulness. For the holy war, and the recovery of the sepulchre

of Christ from the infidels, no aids could be thought exorbitant ; and for his wars after his return, he was readily supplied out of affection ; for the remorse he showed for having occasioned his father's death, his admirable valor, the injustice of and the cruel treatment he received in his captivity, and, above all, the opposition between the perfidious conduct of the French king, and his own openness and sincerity, endeared him to his subjects, made them shut their eyes on his many failings, and bear their burdens with patience.

Two things only passed in this reign proper for the subject of these lectures, the steps made for settling the succession of the crown, and the laws of Oleron. As Richard was unmarried when he set out for Palestine, he thought it proper to prevent, if he could, any doubt that might arise, in case he died without issue. There might, in this case, be two competitors, Arthur, the son of Geoffry, his next brother who was dead, and John the youngest brother, who was living. However clear the point is at this day in favor of the nephew, it was then far otherwise. For Arthur might be urged the right of representation. He represented his father Geoffry ; in all the fiefs in France, the law was in favor of the nephew ; nay, Glanville, who wrote in Henry the Second's reign in England, as to English estates, declared to the same purpose ; and certain it is that the general current of opinions at that time tended that way†.

On the other side, it might be said in favor of John's pretensions, that the examples of fiefs could be no precedents in case of crowns. These required

† Hale, hist. com. law, chap. 7.

more strictly, a person capable of acting in person. That this was the very case ; John was a man, Arthur a child ; that, allowing Glanville to have laid down the law right, he had made a distinction, which comes up to this case ; for he says, the uncle shall succeed, if the father of the nephew had, in his lifetime been *forisfamiliated* ; That Geoffry had been out of the *patria potestas* of Henry, by being sovereign prince of Britany ; that in the Saxon times two cases, for the exclusion of infants, had happened, much stronger then the present ; that when Edmund the First died in possession of the throne, his brother Edred succeeded, not his sons ; and though Edmund Ironside had been king, yet, after the Danish usurpation ceased, his brother the *Confessor* was preferred to his son, though of full age, whereas Geoffry never had the crown ; that, since the conquest, three several times had the lineal succession been set aside by parliament. So that there were not wanting plausible arguments of each side of the question, and it is with injustice that modern historians, considering only the maxims of their own times, when a regular succession has been established, charge John with a manifest usurpation of the crown of England. But that he was a manifest usurper of the territories in France must be allowed ; for, by the laws of that country, they should have gone to the nephew.

A question of this weight and difficulty should regularly have been decided in parliament, which always hitherto had determined in such matters ; but Richard had never thought of the business till he left England, and then it was too late to proceed in that method. He was obliged, therefore, to content him-

self with declaring, by his own authority, his nephew Arthur his successor ; and, to prevent John's traversing his design, he exacted an oath from him not to set foot in England for three years ; but from this obligation he afterwards released him, at the request of their mother. John used all his art to caress the nobility, and to supplant his nephew Arthur, as he fondly hoped Richard would never return. And indeed, the conduct of William Longchamp, bishop of Ely, Richard's viceroy, contributed greatly to his success ; for, as to oppressions and outrages, he was not exceeded even by William Rufus himself. This gave John a pretext for intermeddling to preserve the liberties of the people. He sent word to that prelate, that if he did not refrain from his exorbitancies, he would visit him at the head of an army ; which for such an occasion he might easily raise.

A general assembly, or parliament, was called, to compose the differences ; in which it was settled, that Longchamp should continue in the administration, and hold the castles during the king's life, but that, if he died without issue, they should be delivered to John as successor ; and this agreement was ratified by the oaths of all the nobility and prelates, so that, as Arthur had the decision of the king in his favor, John by this means attained that of the people. Sensible how much this step must offend the king, and of the dangerous predicaments he must stand in should he return, he spared no pains to ascend the throne even in the life of his brother, in which he was cordially supported by the king of France. But all his efforts were baffled by the vigilance of the regency, who had been appointed on Longchamp's de-

position, and was more necessary from his continuing in his former extravagances. John even gave out that Richard was dead, and seized several castles, which he put in a state of defence. He was, however, soon reduced, upon the king's return, and all his treasonable practices pardoned at the intercession of his mother. When Richard came to die, he changed his mind as to Arthur, and by will appointed John his successor : an alteration, considering his former attachments to his nephew, who had never offended him, that could proceed from nothing but his unwillingness to leave his dominions involved in a civil war through the intrigues and interest of his brother.

The laws of Oleron concerning naval affairs, are the only specimen of this prince's legislative capacity. They were made at the isle of Oleron, off the coast of France, where his fleet rendezvoused in their passage to the Holy Land, and were designed for the keeping of order, and the determination of controversies abroad. With such wisdom were these laws framed, that they have been adopted by other nations as well as England. And, I think, to this time we may, with probability enough, refer the origin of the admiralty jurisdiction. In his reign, for the first and the last time, was raised the feudal aid, for the redemption of the king from captivity.

Notwithstanding all the faults of this prince, his firmness against the papal power is to be commended. Two of his bishops having a controversy, there was an appeal to the Pope, who sent a legate to determine it ; but Richard prevailed on the parties to refer it to his arbitration, and would not suffer the

legate to enter England, till he had made an end of the business ; and when he did come, the king suffered him not to exercise his legatine power in any but one single point, and that by his express permission. Notwithstanding all the steps taken in favor of John, in order to pave the way for his succession, the notion of Arthur's hereditary right had taken such strong root in the minds of many, that, had he been in England, and of a sufficient age to manage his affairs, he might have had a fair prospect of success†.

The lower people indeed were easily prevailed on by his agents to take the oath of fealty to John, while the prelates, and nobility in general, retired to their castles, as deliberating what steps they should take ; but, at length, by magnificent grants, and more magnificent promises, they were prevailed on to come in, and he mounted the throne without opposition. But in the French provinces his usurpation met with more resistance. Arthur had many partizans, and his cause was espoused by Philip of France, the lord paramount, not with an intention to strip John of all ; for that, with Britany, would have made Arthur too powerful ; but with a design to divide the dominions more equally between them, and perhaps to clip off a part for himself, as he afterwards did Normandy, as being forfeited by a sentence of the peers of France, by John's murder of Arthur. By the way, I shall observe, that this sentence was notoriously unjust. By the laws of France, Arthur was the undoubted heir of Normandy, and on his death his sister ought to have succeeded, nor ought the duchy to have been

† Mare Claus. 386. Kennet's historians, Hume. Carte.

forfeited by the crime of a wrongful possessor. Or, taking it the other way, that Philip had a right to choose his vassal, and, consequently, that the investiture he gave to John was valid ; then was he rightful duke of Normandy, and Arthur, as duke of Brittany, was his vassal, and had justly forfeited his life, by rebelling and endeavoring to depose his liege lord. That John was guilty of this crime there was no room to doubt ; and truly, from the whole of his conduct from that time, he seemed to have been infatuated by the terrors of his conscience ; for it was but little less than frenzy. He knew he was, by this cruel act, become the detestation of his subjects in general, and that his father, in the midst of his power and popularity, had been humbled by the Pope ; and yet, at the same time, he trampled on the liberties of the former, and oppressed them in the most outrageous manner, and while his subjects were thus affected, he openly set the latter at defiance.

To this reign, however, so inglorious, and so miserable to the English of that age, do their successors owe the ascertaining their liberties. He was, if we except William Rufus, the first of the kings that openly professed to rule by arbitrary power. I do not mean to deny that every one of his predecessors from the Conquest had, in some particular or other, encroached on their people, but then there were either peculiar circumstances of distress, that almost enforced and excused them, or one or two wrong steps were atoned for by the greatness and goodness of their general conduct. It is very observable, that, as England is almost the only country in Europe that hath preserved its liberties, so was it the first wherein

the kings set up for absolute power : and the preservation of them, I apprehend, was in a great measure owing thereto, that this claim was started there when the feudal principles, and the spirit of independency, except only in feudal matters, were in their vigor, and consequently raised such a spirit of jealousy and watchfulness, as, though it hath sometimes slept, could never be extinguished ; whereas, in other countries, the progress of arbitrary power hath been more gradual. It hath made its advances when the feudal system was in its wane, and when the minds of men, by the introduction of the civil and canon law, were prepared for it.

What encouraged the kings of England to attempt this sooner than other monarchs, we may judge, was the greater disparity in riches between them and their vassals, than was in other countries ; so that nothing much less than a general confederacy could curb them ; whereas, abroad, two or three potent vassals were an overmatch for the sovereign. Besides, having subjects on each side of the water, not knit together in any common interest, they might hope to use the one to quell the other. But whatever was the cause, so was the fact ; and John, even before the death of Arthur, having removed the dread of a competitor, shewed, by a most extraordinary step, what kind of sovereign he was like to prove. By the law of these days a vassal was to pay his relief to his superior out of his own demesnes, and the profits of his seignory, and had no right to demand aid for that purpose from his subvassals. ; John having detached Philip from his nephew's interest, by ceding a part of his French territories, was to pay twenty thousand marks for the relief

of the rest ; and to receive this sum, he, by his own authority, laid three shillings on every hide of land in England ; thus making England to pay that relief for his foreign dominions, which his foreign subjects themselves were not obliged to pay.

The next instance was in favor of the Pope, under pretence of the holy war. Innocent had laid a tax upon the clergy, of the fortieth of their revenues, and sent a collector to England to gather it, whom John, of his own authority, empowered to collect it from the laity. These two impositions were submitted to, in as much as there was no plan of opposition then formed ; but they afterwards occasioned great discontent among a people, who thought no taxes could be raised without their own consent. Accordingly, the next time he summoned his military tenants to attend him into France, they assembled at Leicester, and agreed to refuse attendance, unless he would restore their privileges ; for though, by the law of the Conqueror, they were obliged to go, they looked upon this obligation as suspended by his behavior. However, they had not yet sufficiently smarted, to unite them thoroughly, and this affair was made up by his accepting a scutage.

To enumerate all the exorbitances he committed would be tedious, and unnecessary, as the remedies prescribed in *Magna Charta* sufficiently point out the grievances. Let it suffice to say, in general, that he oppressed his military tenants by exacting extravagant reliefs, by disparagement of heirs, by waisting his wards lands, by levying exorbitant scutages, by summoning them to war, and delaying them so long at the place of transportation that they were obliged to return

home, having spent all their money ; or, when they were transported, keeping them inactive till they were obliged to return for the same reason, and then, without trial, seizing their lands as forfeited. The same oppressions he extended to others, seized lands and tenements at will and pleasure, imprisoned whom he pleased, laid heavy talliages on the socage tenants and boroughs, without any regard to the privileges they had obtained from his predecessors ; and having by these means excited the detestation of his subjects, and forfeited his reputation by losing Normandy by his indolence, he took it into his head that he was a match for the Pope, and engaged in a contest with his Holiness, which subjected him and his kingdom to the Roman See, though eventually it contributed not a little to the recovery of his subjects liberties. * The manner in which this happened shall be the subject of the ensuing lecture.

*Brady, Daniel, Tyrrel, and the general histories of England.

 LECTURE XXXVII.

John's dispute with the court of Rome....Cardinal Langton promoted to be Archbishop of Canterbury....Pope Innocent lays the kingdom under an interdict....John is excommunicated....His submission to Innocent....The discontents of the Barons....Magna Charta and Charta de Foresta....An examination of the Question, Whether the rights and liberties, contained in these charters, are to be considered as the ancient rights and liberties of the nation, or as the fruits of rebellion, and revocable by the successors of John ?

IF Alexander the Third shewed the grandeur of the pontifical power in humbling Henry the Second, the displaying it in its full glory was reserved for Innocent the Third who now reigned, and who being promoted to the papacy at the age of thirty seven, had vigor of body and mind to carry every point he engaged in, and was resolved to push his power to the utmost. Having tasted the sweets of English gold, in the collection made under pretence of the holy war, he had a great desire to renew the experiment ; and that he might be able to proceed with the less opposition, was resolved to have an archbishop of Canterbury at his devotion ; and the See falling vacant, a controverted election furnished him with an opportunity.

The election belonged to the convent of Christchurch, though it was contested with them by the suf-

fragan bishops. The very night the archbishop died, a faction of the younger monks, resolving to have an archbishop of their own choosing, assembled, and chose Reginald sub-prior of the convent, and sent him off before morning for Rome, to obtain the Pope's confirmation, of which they did not entertain any doubt, as it would be plucking a feather from the king's prerogative, that of a previous licence for proceeding to election; and Innocent had already shewn that he looked off himself as monarch of monarchs. But as they could not expect the Pope would take this stride in support of a clandestine election, they all took an oath of secrecy, to be observed till the confirmation was obtained.

But Reginald's vanity defeated the scheme, and made him divulge it, which so provoked his electors, that they joined with the others, petitioned the king for a license, and elected, at his recommendation, the bishop of Norwich, and twelve of the monks were dispatched to solicit his confirmation. The suffragan bishops opposed him, as being elected without their concurrence, which point was determined for the convent by Innocent; notwithstanding which, without assigning any invalidity in the second election, he annulled it as well as the first, and recommended to the twelve deputies to elect Stephen Langton, an Englishman and a cardinal. At first they demurred, as having no authority; but the threat of instant excommunication compelled them to obey. And then, as if they had done nothing out of the way, he recommended Langton to John in a very civil letter. The king, enraged to the highest, turned the monks of Canterbury, who were entirely innocent, out of their con-

vent and the kingdom, and threatened the Pope that he would suffer no appeals. Innocent, who had before this humbled Philip of France by an interdict, and knew the man he had to deal with, proceeded very calmly, to order three bishops to exhort the king to receive Langton, and recal the monks ; and, in case of non-compliance, to lay the kingdom under an interdict†.

The name of interdict frightened John, who knew how much he was hated. He offered to comply, if he might be allowed to make a protestation of a saving his dignity and prerogative ; but no salvo would be allowed. The interdict was published. Divine service ceased through the kingdom, except in a very few places, where some clergymen were found honest and bold enough to preach against the Pope's proceedings. John, in revenge, fleeced the clergy in a most horrible manner ; and, what is yet more surprising, did not desist from oppressing the laity. However, as to the points in contest, he was not obstinate ; he offered more than once to submit ; but Innocent had more extensive views. There was no remission without he refunded to the churchmen every farthing he had extorted from them, a thing absolutely out of his power. Then followed, after successive delays calculated to shew that the holy father would give his undutiful son time to repent, a sentence of excommunication by name, a bull absolving his subjects from their oath of allegiance, and commanding all persons to avoid his company ; and, lastly, a sentence of deposition, and a grant of all his dominions to the king of France, who had been invited also by John's subjects,

†Kennet's historians. Hume. Carte.

whose patience had been by this time quite exhausted with his tyranny, and the suspension of the performance of divine service.

Philip was very ready to execute this sentence, and assembled a numerous army. Randulf was sent, as the Pope's legate, to see the sentence of deposition put in execution ; but, in reality, with secret instructions of a very different nature ; for it was by no means Innocent's intention to give England to France, but to subject it to himself. John, terrified with the exaggerated account of Philip's armament, and the disaffection of his subjects, submitted in every point before in contest, and in one new one, that no clergyman should be outlawed. But this was not sufficient to avert the danger from Philip, and his own disaffected barons. To make him sacred and invulnerable, he became a vassal to the Pope, resigned his kingdom to him by a formal charter, and received it again as a favor, under homage, and a yearly rent of a thousand marks.

In consideration of this submission, John was favored in the point of indemnifying the clergy, which was what had so long retarded the accommodation. Innocent took the estimating this on himself, and having got all he wanted for the See of Rome, forgot his former clients the clergy, and was very moderate with his new vassal. However, the interdict was not removed, nor the king absolved from his excommunication, till Langton was put into possession ; which when done, John was obliged to renew his homage, to swear to defend church and clergy against all their adversaries, and to make restitution ; and then he was absolved. But there was one curious addition to this

oath, which Langton, who was an Englishman, and a lover of liberty, certainly inserted of his own head, that he should restore the laws of the Confessor: For Innocent would never, we may be well assured, have allowed such privileges to his vassals. John, however, out of fear of Philip, being in a hurry to be absolved, made no objection; and indeed he had no reason to doubt the Pope would absolve him from his oath. But Langton and the nobles were resolved to keep him strictly to it. Soon after, while he was in France, his regents summoned a parliament, wherein the king's peace was proclaimed, and the laws of Henry the First were revived. These were those he had sworn to restore, being in truth the Confessor's, with a few additions and alterations by the Conqueror and Henry.

John, however, went on in his old courses, being now sure of the Pope's protection, and indeed it was hard to charge him with a breach of Henry's charter, of which, though copies had been lodged in every cathedral and great abbey in England, yet so carefully were they destroyed, that not one appeared. At length archbishop Langton furnished them with one, which had escaped the general calamity; and this the associated barons, who had determined to restrain John, and recover their liberties, made the basis of their demands, and swore to demand, and if refused, to vindicate with the sword, at a meeting they had at Edmundsbury under pretence of devotion. Accordingly, they waited on the king in a military dress, and made their demands; but he, seeing they were only a party among the nobles, and not imagining the rest were of the same sentiments, not only re-

fused, but with haughtiness insisted they should renounce them, by giving under their hands and seals, that they would never make the like demand on him or his successors. But his eyes were opened when he found scarce two or three of those that were with him would comply. He had recourse to procrastination, and promised them satisfaction at the latter end of Easter. In the interim he exacted a new oath of allegiance from his subjects; a feeble precaution; for none refused it, or thought themselves precluded by that act of duty from vindicating their rights in what manner they best might. To secure the clergy, he gave them a charter, confirming their immunities, and the entire freedom of their elections; and yet a great multitude continued zealous for the liberty of the subject against him; but his main dependance was on religion. To render his person sacred, he assumed the cross, as if he intended for the holy war, and implored the protection of his Holiness, to whom the discontented barons also represented the justice of their pretensions. Innocent, in appearance, received them favorably, advised them to represent their hardships in a decent and humble manner to the king, in which case he would interpose in favor of all their just and reasonable petitions; but annulled their association, and forbade them to enter into any new one for the future.

The barons, who sent to the Pope rather out of respect than any expectation of favor, proceeded in the method they began. They and their vassals assembled in array, in such numbers as to compose a formidable army; and when they had particularly specified their demands, and were refused, they proceeded to attack

him, by reducing his castles. Against himself, as being under the cross, they made no attempt. On this occasion, archbishop Langton, who was at the bottom of the whole confederacy, outwitted John ; who, as they had disobeyed the Pope, was impatient to have them excommunicated, and this the Pope promised to do as soon as the foreign troops, which the king had brought over for his defence, had quitted the kingdom ; but when they were gone, he broke his engagement, so that John, left defenceless, was obliged to appoint four nobles to treat with the revolted lords ; and, upon conference, some points they had insisted on before being given up, the liberties of the nation were settled, as contained in the two charters of *Magna Charta*, and *Charta de Foresta* †.

The manner of obtaining these charters and the right the people have to the liberties contained in them, have been the subject of much controversy between the favorers of arbitrary power and the assertors of freedom ; the one, contending that they were the fruits of rebellion, extorted by force and fraud, from a prince unable to resist, and therefore revocable by him or his successors ; and the others, that they were the ancient privileges of the nation, which John had, contrary to his coronation-oath, invaded, and which they therefore had a right to reclaim by arms. That they were obtained by force, is undoubted, and that John and many of his successors looked upon them, therefore, as of no validity, is as clear, even from the argument lord Coke brings for their great weight,

† Blackstone's discourse concerning the history of the charters. Gurdon's hist. of Parliament. Hale, hist. common law. ch. 7.

their being confirmed above twenty times by act of parliament. To what purpose so many confirmations, if the kings had not thought them invalid, and had not, on occasions, broke through them ; and were it as clear that they were not the ancient rights of the people, it must be owned they were extorted by rebellion. But that they were no other than confirmations, appears very plainly from the short detail I have heretofore given of the constitution and spirit of the monarchy of the Saxons, and all other northern nations.

As to any new regulations introduced in them, as some there are, they are only precautions for the better securing those liberties the people were before entitled to, and it is a maxim of all laws, that he who has a right to a thing, hath a right to the means without which he cannot enjoy that thing.

The friends, therefore, to absolute power, sensible that the original constitution is against them, choose to look no farther back than the Conquest. Then, say they, the Saxon government and laws were extinguished, the English by the Conquest lost their rights, the foreigners had no title to English liberties, and the Conqueror and his son William acted as despotic monarchs. Therefore, their successors had the same right, and it was treason to think of controlling them. But how little foundation there is for this doctrine, may appear from what I observed on the reign of the Conqueror. He claimed to be king on the same footing as his predecessors ; he confirmed the Saxon law, and consequently both Saxons and foreigners, when settled in the kingdom, had a right to them. If he oppressed the English, that oppression did not extend to all ; and to those it did, it was

not exercised as upon conquered slaves, but as upon revolted rebels. But, for argument sake, to allow that the English became slaves, and that the foreign lords had no right to the Saxon privileges, both which are false, how came the king to be despotic sovereign over them? They were partly his own subjects, freemen, according to the feudal principles, who served him as volunteers, for he had no right to command their service in England; or volunteers from other princes' dominions; and to say that freemen and their posterity became slaves, because they are so kind as to conquer a kingdom for their leader, is a most extraordinary paradox.

But William the Conqueror, in some instances, and his son in all, acted as despotic princes; therefore they had a right so to do. I answer, the triumvirs proscribed hundreds of the best Romans, therefore they had a right. It is as unsafe to argue from matter of fact to matter of right, as from matter of right to matter of fact. It is as absurd to say, Tarquin ruled absolutely, therefore the Romans were rightfully his slaves, as to say the Romans had a right to liberty under him, therefore they were free.

But it may be said, the people quietly submitted; and new rights may be acquired, and new laws made, by the tacit consent of prince and people, as well as by express legislation. I allow it where the consent is undoubtedly voluntary, and hath continued uninterrupted for a long space of time; and how voluntary this submission was, we may judge from the terms they made with Henry the First, before they suffered him to mount the throne. Besides, there are some points of liberty, essential to human nature, that can-

not, either by express or tacit laws, be given up, such as the natural right that an innocent man has to his life, his personal liberty, and the guidance of his actions, provided they are lawful, when the public good doth not necessarily require a restraint. In short, never was there a worse cause, or worse defended; and this maxim was what influenced the conduct of the Stuarts, and precipitated that unhappy house to their ruin.

John, who entertained the same sentiments, had no resource to recover his lost rights, as he thought them; but the assistance of the Pope, and an army of foreigners. The first very cordially espoused his interest. He was provoked that he, who had humbled kings, should be controlled by petty lords, and that by these privileges he should be prevented from reaping that golden harvest he expected from England. He annulled the charters, commanded them to recede from them, and on their disobedience, excommunicated them, first in general, and then, by name.

About the same time arrived an army of veteran foreigners that came to assist John, who had, in imitation of the Conqueror, distributed to them the estates of the barons. With these and a few English lords, he took the field, and ravaged the country with a more than Turkish barbarity. The confederate barons saw the liberties they had contended for annulled, their lives and estates in the most imminent danger, and, in a fit of despair, invited Lewis, prince of France, to the crown, who, bringing over an army, saved them from immediate destruction. However, this strengthened John. It was not for any to stand neuter. Few chose to embark in an excommunicated party, and

many, who saw slavery unavoidable, and nothing left but a choice of a master, preferred their countryman for a king to a foreigner. The loss of liberty now seemed certain, which ever prevailed; when the haughtiness of Lewis, and his want of confidence in the English noblemen who joined him, concurring with the death of John, and the innocence of his infant son, providentially preserved the freedom of England.

LECTURE XXXVIII.

The minority of Henry III.....Ecclesiastical grievances....The dispensing power....The canon law....Confirmation of Magna Charta.....A commentary on Magna Charta, in so far as it relates to what now is law.

JOHN left his minor son under the guardianship of the Earl of Pembroke, a nobleman of great abilities, and the strictest integrity. The first step he took for the benefit of his pupil, was the confirmation of the charters, and the next was a negotiation with the revolted lords, who began to be discontented with the prince of France ; which succeeded so happily, that in a short time he brought them all over with very little bloodshed, and Lewis was obliged to quit the kingdom. Peace being re-established, the regent applied himself with all diligence to restore the peace of the kingdom, and justice to her regular course : And had he lived long enough to form the conduct and principles of the young king, England never had a fairer prospect of happiness ; but he soon dying, and his successors being men of a different stamp, such principles were sown in the monarch's mind, as, in the event, produced bitter fruit both to him and the whole kingdom.

This reign was as calamitous as the preceding one, and rather more shameful ; and what added to the

misfortune, it lasted three times as long. As soon as Henry came of age, he revoked *Magna Charta*, as being an act of his nonage, soon after he confirmed it, then broke it, then confirmed it by oath, with a solemn excommunication of all that should infringe it ; then he obtained from the Pope a dispensation of his oath, and broke it again. And thus he fluctuated for fifty years, according as his hopes or fears prevailed. However, in general, the charter was pretty well observed. The great point it was infringed in, was the levying money without the parliament, and in this he frequently prevailed, being assisted by his Lord Paramount, the Pope. They joined in levying taxes, and then divided the spoil between them. Indeed, their Holinesses had, upon each occasion, by much the greater share ; for they not only fleeced the clergy separately, but drew vast sums from the king, on pretence of a foolish project of making his younger son king of Sicily ; all which they squandered on their private occasions.

In this reign they introduced the practice of provisorship, against which so many acts of parliament have been made. It went on this maxim, That the Pope was universal pastor of the church, and consequently sole judge who should be his deputy in any particular place. The inference necessarily followed, that the rights of patronage to livings, whether in a Bishop or lay patron, were, strictly speaking, no rights at all, being such only where the Pope did not choose to interfere. But this privilege would have been of little significance, if they could act only in the vacancy of a living ; for it would generally have been filled up before he could have notice. Bulls of

provisorships were, therefore, invented. These were charters of the Pope, directed to the bishop, acquainting him, that he had provided for such a person, by appointing him to such a benefice, when it should become vacant, or the first benefice of such a value that should fall ; strictly forbidding the Bishop to admit any other person, upon any account whatsoever. Sometimes the person provided for was not named ; but notice was to be given when the vacancy happened. In process of time a number of livings were resolved in the same bull ; nay, one went so far as to forbid any living that should fall, to be filled, till the Pope had provided for three hundred persons. Such were the delightful consequences of John's homage, and of England becoming St. Peter's patrimony ; so that the monkish historians tell us that Rome sheared all Europe ; but in England they flayed off the skin. An account was taken at one time of the value of English benefices possessed by Italian priests, non-residents, and it was found to exceed the ordinary revenue of the crown. All these bulls concluded with a *non obstante*, that is, notwithstanding any laws, custom, privilege, right, or patronage, or any thing else whatever ; and this hopeful precedent Henry the Third adopted in his charters, thereby, if he could not repeal, at least making ineffectual the laws of the land ; and thus began the king's claiming a *dispensing power* over the laws†.

In this meridian of the Pope's power was the canon law introduced into England, and it soon began to usurp considerably on the civil courts ; insomuch

† Sir Robert Atkins on the dispensing power. *Bibliotheca Politica*. The general histories of England.

that, had not the common law judges exerted themselves to check the ecclesiastical court by prohibitions, which they did even in this reign, it would have gained the same ascendant that it has in the Pope's territory.

The latter end of this reign was filled with a succession of troubles, occasioned by the repeated breaches of the charters, and fomented by the ambition of some of the great nobles; however, in the end, the king prevailed, by the assistance of his son; but it was found expedient, even in the midst of victory, in order to prevent future convulsions, to establish the liberties of England, by confirming *Magna Charta*; and they have ever since stood their ground. I shall therefore proceed briefly to speak to *Magna Charta*, and in so doing shall omit almost all that relates to the feudal tenures, which makes the greatest part of it, and confine myself to that which now is law.

The first chapter of *Magna Charta*, as confirmed in the 9th year of Henry, which is that now in force, and differs from that of John in some omissions, concerned the freedom of the church, in which was principally included the freedom of elections to bishopricks, which, since the reformation, has been taken away. I shall, therefore, proceed to those that concern the laity; the five next are feudal, and the seventh is concerning widows. It first gives them free liberty to marry or not; whereas, before, such as were called the *king's widows*, that is, those who held lands, or whose husbands held lands of the king, had been obliged to pay for license to marry if they had a mind, or were distrained to marry, if they had

no mind, which it is unnecessary to say was a grievous oppression. It restrains the taking any thing from the widow for her dower, or for her own land, which her husband had held in her right. It provides for her *quarantine*, that is, gives her leave to stay forty days in her husband's house, unless she had a dower assigned to her before, and within that time orders the third part of her husband's land to be assigned her by the heir, as her dower; and that, in the interim, she should have reasonable estovers†.

The next is in favor of the *king's debtors*, and their securities. By the old law, the king's profit was so highly favored, that he could, to satisfy his debt, seize the chattels or extend, that is, to take the profits of the real estate of his debtor, at his pleasure; or he might, in the first instance, come on the security, without attacking the principal debtor. For remedy hereof, it forbids the king, or any of his officers, seizing the land, while the debtor's personal chattels are sufficient. It forbids, also, the distraining the securities, while the debtor's chattels were sufficient. If they were not, the king had the option either to seize the land of the debtor, or distrain the securities; and if the latter was done, it provides that the securities should have the land, until they are reimbursed. Immediately after this, in king John's charter, followed the law prohibiting the king from levying any talliage or tax on the socage tenants, or on boroughs, without assent of parliament, which is here omitted; and this king and his son Edward asserted and exercised the right; but the last was at length obliged to give it up, in the famous statute *de tallagio non concedendo*, and not till then were these

†Ruffhead, vol. 1.

ranks of the people entirely emancipated. This omission for a time rendered illusory the next, the ninth chapter, which provides that the city of London and all the other cities, boroughs, and ports, should enjoy all their ancient liberties and customs; for these would be of little use whilst arbitrary taxation remained. The tenth is in affirmance of the common law, that no person should be distrained for more rent or services than he owed out of the land. If he was, he had a double remedy, either by a *suit in replevin*, or by the writ called *ne injuste vexes*. The next is for fixing the Court of Common Pleas, of which I spoke already. The twelfth was for the ease of the people, by taking assizes in the country. But those actions are out of use now. The thirteenth is concerning assizes too. I hasten therefore to the fourteenth that treats of *amerciaments*.

Amerciaments come from the word *mercy*, and are so called from the words in the record, *sit in misericordia pro falso clamore suo*, and were properly, though the word hath been since extended, what a plaintiff or defendant that had troubled the king's courts should pay by way of punishment for maintaining an unjust suit; whereas *finés*, to which they bear a resemblance, and with which they have sometimes been confounded, were for offences, and assessed by the court; as were *amerciaments* also sometimes, and very grievously, though entirely against law. This act restores the common law; orders the *amerciaments* to be proportioned to the nature of the case, and also, in regard to the man's circumstances, so that he should not be ruined thereby; that no freeholder should be amerced in so heavy a manner as to

destroy his freehold ; no merchant, his merchandize ; no villain his carts, whereby he would be unable to do his lord's services ; no ecclesiastic according to the value of his benefice, but only according to his lay property. And that this might be constantly observed, the amerciements were to be asserted, or settled by the man's peers. It may be asked, what remedy had the man, who was too severely amerced by his peers ? On this act was grounded the writ of *moderata misericordia*, whereby this amerciament may be tried by another jury, and moderated.

The fifteenth provides, that none should be distrained to repair bridges, or landing places, but who are bound by their tenures or custom. The sixteenth for the free navigation in rivers, and unloading of goods. The seventeenth takes away the power of trying pleas of the crown from sheriffs, constables and coroners, and other inferior officers ; a very necessary law, upon account of the great value of the life of an individual, especially as none but the king's courts could give the benefit of clergy. However, sheriffs and coroners can take *indictments* ; for that is not *trying*, but bringing the matter into a method of trial. The eighteenth concerns debts due to the king where his debtor is dead. By this law, the first duty of executors is to pay the debts of the deceased ; those of the highest nature, not as to *value*, but in *quality*, in the first place, then the lower ones : and if the effects were not sufficient, it was in their option to pay one creditor of the same nature without another, so that they observed the rule of not paying the lower debtor before the higher. But the king, be his debts of what nature they would, by his prerogative,

had the preference of all creditors, and by colour hereof his officers often seized and embezzled the effects of the deceased, to the prejudice of other creditors and legatees. This orders the sheriff to attach and value the goods by a jury of twelve men, to the value of the debt, which were to remain unremoved, till the king was paid ; and then the whole, or, if not, the overplus, to be restored to the executors. The two next are feudal. The twenty-first relates to purvey- orship, which has been abolished.

The twenty-second relates to the king's right to the lands of felons. On which there is something curious to be observed. By attainder of felony, the goods and chattels of the felon are forfeited to the king, and the land to the lord from whom they were holden ; but in case of treason, both were forfeited to the king. Such was the feudal law ; but by the law of England, in order to deter persons from committing felony, and to make the lords more careful what kind of tenants they chose, the king had an interest in the land of felons ; not for his own benefit indeed, but for the terrifying by example. He had a right to commit waste in them, to cut down the trees, to demolish the houses and improvements, and to plow up the meadows ; and for this purpose he was allow- ed, by common law, a year and a day. To prevent this destruction, the lords, to whom the land escheat- ed frequently, by a fine, bought off the kings right of waste ; but if they did not, his officers would take the profits for the time, and then hold it longer, till they had committed the waste. This act prohibits the retaining the land longer than a year and a day, and directs that then it should be restored to the lord.

This new law was certainly intended for the public good; to prevent this malicious wasting, which the king's officers would be sure to commit, if they were not properly, as they thought, considered; and to give the king, in lieu of the waste that he had a right to make a lawful profit, which his officers had unlawfully, to their own use, we may be sure, extorted before. It gives the custody of the lands for that time, and consequently the profits. But observe the consequence.

The king now had the custody, as also the profits, by a legal title for a year and a day, unless the lord pleased to compound with him, and so entitle himself to the immediate possession. But this did not satisfy the greediness of the officers of the crown. It was easy to gather the profits until very near the time the king's right expired, and then, for a week or fortnight before it was out they had it in their power to commit waste enough, if the lord, who was entitled by the escheat, did not buy them out. This was certainly against the spirit of the law whereof we are speaking, which was intended to give the king a real profit, instead of a right destructive to the community in general; but the waste was not prohibited expressly, and this was pretext enough for these officers to exact composition for not doing it, within the year. It was accordingly claimed and paid, and accounted for as due to the king, on that old maxim, that general laws do not change the prerogative royal, but by express words. This was the doctrine and practice in the courts of the third Henry, and convenient enough for him who was always indigent. But what was the opinion of the lawyers of that age, we may

learn from Bracton, Britton, and the author of Fleta ; the first of which wrote in the latter end of this reign, and the other two in the reign following. Bracton says expressly, that “ the king’s power over the
 “ lands of felons convicted, was because he had a right
 “ to throw down the buildings, unroot the gardens,
 “ and plow up the meadows; but because such things
 “ turned to the great damage of the lords, it was
 “ provided, for common utility, that such houses, gar-
 “ dens, and meadows, should remain, and that the
 “ king for this should have the advantage of the
 “ whole land for a year and a day, and so every thing
 “ should return entire to the lord. Then he goes
 “ on, but now both is demanded, namely, a fine for
 “ the term, likewise for the waste, nor do I see the
 “ reason why*.” Thus far Bracton. Britton says, speaking in the person of the king, of felons, for in that manner his book is written, “ Their moveables
 “ are ours ; their heirs are disinherited ; and we
 “ will have their tenements, of whatsoever holden,
 “ for a year and a day, so that they shall remain in
 “ our hands that year and day, and that we shall not
 “ cause to perish the tenements, nor hurt the woods,
 “ nor plow the meadows, as hath been accustomed
 in time past †.” Fleta talks in the same strain, in commenting on this law of *Magna Charta*, which he expressly quotes, that, as a mark of brand on felony, it had been anciently provided that the houses should be thrown down, and so goes on to enumerate the other species of waste, which I need not here repeat,

* Lib. 3. p. 129. 137.

† Chap. 5.

as I have mentioned them already; and then he says
 “because by such doings great damage would accrue
 “to the lords of the fiefs; for common utility it was
 “provided, that such hardships and severities should
 “cease; and that the king, in consideration thereof,
 “should, for a year and a day, enjoy the commodity
 “of the whole land; after which term it should re-
 “turn to the lords of the propriety entirely, without
 “waste or destruction†.” The *Mirror*, another an-
 cient law-book, joins with these; and this book,
 which was written in the same reign of Edward the
 First, or, at the latest, in that of his son, says, “the
 “point of felons lands being held for the year is dis-
 “used; for by that, the king ought not to have but
 “the waste by right, or the year, in name (that is, in
 “nature) of a fine; to save the fief from *estrepement*
 “(that is, waste) the ministers of the king take both
 “the one and the other*.” A melancholly consid-
 eration, that, under his name, and in pretence of his
 profit, though not really to his advantage, such a law
 should, for their own profit, be eluded by his minis-
 ters; as by these testimonies, one cotemporary, and
 the rest immediately subsequent, we are informed it
 was contrary to the intention of this chapter of *Mag-
 na Charta*; but the practice prevailed for a long time
 after. I shall conclude this lecture with the words
 of Lord Coke on this chapter of *Magna Charta*.
 “Out of these old books you may observe, that
 “when any thing is given to the king, in lieu or satis-
 “faction of *an ancient right of his crown*, when once
 “he is in possession of the new recompence, and the
 “same in charge, his officers and ministers will ma-
 † Lib. 1. cp. 28. * Cap 5.

“ny times demand the old als^o, which may turn to
“great prejudice, if it be not duly and discreetly
“prevented†.”

† 2 Inst. p. 37.

LECTURE XXXIX.

Continuation of the commentary on Magna Charta.

THE twenty-third chapter of *Magna Charta* prohibits *fish weires* in rivers, which are great annoyances to navigation, and the free liberty of fishing; and which have stood their ground in spite of all the laws that can be made against them. The next relates to the inferior courts of Lords of Manors, and to writs of *Præcipe in capite*; which having gone into disuse, with the feudal tenures, I shall pass them over. The twenty-fifth orders, that measures and weights should be one and the same through the whole kingdom; witness the difference between Troy weight and Averdupois; the wine gallon and ale gallon. Established customs, which of necessity must come into daily practice, are hard to be rooted out by positive laws; and indeed it is more prudent to let them continue. For the confusion that such an alteration of things in daily or hourly practice would occasion, would be more detrimental, for a considerable time at least, than the uniformity intended to be introduced would be attended with advantage †.

The twenty-sixth is concerning the writ *De odio et atia*, that is, of hatred and malice; which, though not abolished, hath long since been antiquated; but, as

† 2 Inst. 38. 41. Barrington on the Statutes, p. 15. 16.

it was an ancient provision for restoring the liberty of the subject, I shall take some notice of it. It was a maxim of the common law, that no man imprisoned for any offence, which, if proved, would touch his life or members, could be bailed out but by the supreme criminal court, the King's Bench ; which, upon danger of death, or such other special causes as appeared sufficient to them, had that power. Hence, in those unsettled and oppressive times, it became a practice for malicious persons to have a man clapped up in prison for a capital offence, without either indictment or appeal brought against him ; and there he was of necessity to lie, until the justice in eyre came into the county to deliver the gaols, which regularly was but once in seven years ; to avoid this hardship, the writ we are now speaking of was invented, and issued out from time to time, as occasion required, out of the Chancery. Besides, by this chapter of *Magna Charta*, it is ordered to be granted without any purchase or reward ; whereas, before, all the original writs were purchased at the price the chancellor pleased to set on them, which was a grievous oppression. It ordered the sheriff to make inquisition in the county court, by the oath of a jury, whether the imprisonment proceeded from malice or not. If they found it did, upon its return, the person accused had a right to a writ, ordering the sheriff to bail him by twelve *manucaptors*, or securities. But this was only where there was no indictment, or appeal ; for these were accusations of record, and therefore the finding the charge malicious in the county court, which was no court of record, could not avail against them. This writ has gone into disuse, since justices of gaol-delivery have

continued to go into every county twice a year ; a proceeding which has evidently superseded the necessity of it †.

The twenty-seventh chapter restrains the unjust practice in the king, of arrogating to himself the wardship of his socage or burgage tenants, where they held lands by military service from others, his subjects. The whole military system hath since been dissolved by act of parliament, and therefore it will be unnecessary for me to explain or enlarge upon the nature of the mischief complained of in this chapter. The next forbids any judge or officer of the king to oblige a man to *wage his law*, that is, swear to his innocence, except in a cause where a suit was instituted against him ; but *wager of law*, being now totally fallen into disuse, I hasten to the twenty-ninth chapter, the corner-stone of the English liberties, made in affirmation of the old common law ‡.

By the bare reading of this chapter, we may learn the extravagances of John's reign, which it was intended to redress. It consists of two parts. The first runs thus : *Nullus liber homo capiatur, vel imprisonetur, aut disseisetur, de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exuletur, aut aliquo modo destruat, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ.* First, then, to see to whom this act extends : the words *liber homo*, in ancient acts of parliament, is in general, rightly construed *freeholders*, and so it means here, in the second

† Mirror, cap. 5. sect. 2. Glanvil, lib. 14. cap. 3. Bracton, lib. 3. p. 121. Fleta, lib. 1. cap. 23.

‡ 2 Inst. p. 43. 45.

branch which prohibits disseisins ; for none but a freeholder is capable of being disseised, no others being said to have a seisin of land. But it must not throughout the whole of this act, be confined to this limited sense. The first branch speaks of the restraint of liberty ; the third, of unjust outlawries ; the fourth, of unjust banishment ; the fifth, of any kind of destruction, or wrongs ; which, offered to an innocent person, are against the natural rights of mankind, and therefore, the remedy must extend to all : and so it hath always been understood ; for women are included in it, and so are villeins, for they are free men against all but their lord.

Let us next consider the end of this part, which is an exception running through the whole ; *nisi per legale judicium parium suorum, vel per legem terræ....* That is, by the common law, which doth not, in all these cases require a trial by peers ; a thing indeed impossible, where the party doth not appear ; in which case there is a necessity of proceeding to judgment another way. Coke observes, the words *legale judicium parium suorum* include the trial both of lords and commons, the finding of the latter being upon oath, and called *Verdictum*, and in which all must be unanimous ; wherein it differs from the trial of lords, for they find not upon oath, but upon honor ; and it is not necessary that all should agree, the majority, provided that majority consists of twelve, being sufficient.*

Upon this a question may be put, who are the peers of a woman of quality ? If she be noble by blood, that is, a peeress, (for I speak not of the no-

* 3. Institut. p. 48. 49.

bility by courtesy, which is merely nominal) there is no doubt but the barons and other noblemen ; if she be ennobled by marrying a peer, she becomes in law one person with her husband, and therefore must have the same peers with him, which right continues after her husband's death, unless she marries a commoner ; for then, being one person with him, she becomes a commoner ; whereas a peeress, in her own right, marrying a commoner, forfeits not her dignity, though she becomes one person with him. She was not ennobled by her own act, and therefore, by no act of her own can destroy that nobility she has by the gift of God, or the king, by means of her blood, which she cannot alter.

Two exceptions, however, there are to the rule of every Englishman's being tried for offences by his peers ; but neither of them against the purport of this statute. First the statute speaks in the disjunctive, *per legale iudicium parium suorum, aut per legem terræ* : now the *lex terræ*, the common law, in the universal practice of it, allows these exceptions ; nor will they be found to be against the letter ; for the words are *nec super eum ibimus, nec super eum mittemus*, speaking in the person of the king ; which shews that it is meant of the accusation or other suit of the king. Now these exceptions are not at his suit... One of these exceptions I mentioned in a former lecture. It is where a commoner is impeached by the commons in parliament ; and the reason I then gave, is, I think, plain and satisfactory, that every jury that could be summoned is supposed a party to the charge brought by their representatives, and therefore, as the man is accused as an enemy to the king by the

body of the people, that there may not be a failure of justice, the lords, as the only indifferent persons, must be the judges.

The other exception may seem more extraordinary. It is that a lord of parliament appealed, that is, accused of a crime by a private person, not for the satisfaction of public justice, but of his own private wrong, shall not be tried by his peers, but by a jury of commoners. When this law was introduced, the lords were few in number, immensely rich and powerful, linked together frequently by alliances, almost always by factions. In this towering situation, they looked down on the lower ranks with disdain; frequently injured and oppressed them; and little prospect would the poor commoner have of redress, were the criminal to be tried by those of his own rank, several of them his relations, most of them liable to be suspected of the same offences; especially, as the law will not allow a lord to be challenged. Neither did the lord run any extraordinary risk of being unjustly condemned. The lower rank of people in all countries and ages have been used to look with respect on persons possessed of great wealth and power, invested with titles of honor, and dignified by blood of an ancient descent. But, in those military ages, such veneration was highly increased by that valor and personal bravery, which distinguished every one of the nobility, and than which no virtue is more apt to captivate, in general, the hearts of mankind. Besides, that the lord had his advantage of challenging suspected jurors; whereas, if tried by his peers, he had not such privilege of exception, though they were ever so notoriously his enemies. Every commoner

almost, how great soever, was, in those days, under the influence of some one or other of the lords, and there could be little doubt but that influence would be exerted, and successfully too, unless the guilt was too clear and evident.

It may here be asked, When a civil suit is depending between a lord and a commoner, how the issue is to be tried, whether by the lords alone, or by commoners only, or by a jury composed of an equal number of each ; in the same manner, as, when an alien is tried, it is by a jury half natives, half aliens ? The answer is, it shall be tried by a jury of commoners ; only, on account of the dignity of the lord, there must be a knight on the jury. I need not enlarge on the reason, as it is the same with the former, the lesser danger of partiality.

I now come to the other part of the disjunctive, *aut per legem terræ* ; and it will be necessary to point out in general (for to descend into particulars, would carry me a great deal too far) the principal cases, where this *lex terræ* supersedes the trial *per pares*.... First, then, if a man accused of a crime pleads guilty, so that there is no doubt of the fact, it would be an absurd and useless delay to summon a jury, to find what is already admitted : accordingly, by the *lex terræ* judgment is given on the confession. So in a civil action, if the defendant confesses the action, or if he appears, and afterwards, when he should defend himself, makes default, and will not plead (which case is equivalent to confession) no jury is requisite.... So, if both parties plead all the matters material in the case, and a demurrer is joined, that is, the facts agreed on both sides, and only the matter of right,

depending on facts already allowed, in contest, the judges shall try by demurrer, and give judgment according to *law* without a jury. The general rule is, that the jury shall try *facts*, and the judges the *law*; for it would carry a face of absurdity to expect from a common, or indeed, from any jury, a decision of a point of law that is controverted between the lawyers of the plaintiff and defendant, who have made that science their particular study. Besides, as the law inflicts so heavy a punishment on jurors who give a false verdict, it would be the utmost cruelty to force men unpractised in law to run such a hazard, where it must be supposed an equal chance, at least, they may mistake. The same dangers that the jurors would run by mistaking the law, hath, in points complicated both of law and fact, introduced *special verdicts*, that is, the finding of all the facts by the jury, and the leaving the matter of right to be judged by the court, who best know the law: but this by way of digression.

All the proceedings of courts to bring causes to a hearing previous to the empannelling a jury, and the carrying judgments into execution, are *per legem terræ*, or, as my Lord Coke expresses it, the due process of the law is *lex terræ*. The inflicting of punishment by the discretion of courts for all contempts of their authority, without the intervention of a jury, is also, I think part of the *lex terræ*, and founded in the necessity of enforcing due respect and obedience to courts of justice, and supporting their due dignity. The outlawing a person who absconds, and cannot be found, so as to oblige him to answer a charge against him, whether civil or criminal, is one of these proceed-

ings *per legem terræ* without a jury ; of which, as I have now occasion, it will not be amiss to give a short account, as it is in daily practice *.

By the very ancient law of England, the consequence of outlawry was very troublesome. Not only a seizure of the person, lands and goods, was lawful, but he was looked upon, not, merely, as one out of the protection of the law, but also as a public enemy ; for whoever met him had a right to slay him. This barbarous law undoubtedly proceeded hence, that no person was then ever outlawed but for a felony ; that is, a crime whose punishment was death ; but it was a most absurd thing to allow every private person to execute the offender, who by refusing to answer has confessed himself guilty : and the absurdity became more glaring, when, about Henry the Third's time, process of outlawry began to be extended to all trespasses committed *vi et armis*, when the consequences were so dreadful. Such extension seems surprising ; yet the turbulent condition of the times will, in some measure, account for it ; when, under pretence of dormant titles, forcible possessions, not without frequent bloodshed and murders, were daily taken by the adherents of the king or barons, as their respective parties prevailed. But when the times grew peaceable, this bloody maxim wore out, and in the beginning of Edward the Third's reign, it was resolved by all the judges, that the putting any man to death, except by the sheriff, and even by him without due warrant in law, however outlawed and convicted, was murder ; and since the forementioned times, as the number of people increased, and the opportu-

* 2. Institut. p. 51.

nities of concealment and absconding along with them, it has been found necessary to grant the process of outlawry in many civil actions.

I shall briefly point out the proceedings therein, to shew the abundant care the law of England takes, on the one hand, to do justice to the plaintiff, if the defendant absconds, and will not appear; and, on the other, that the defendant may have all possible opportunity of notice before the outlawry be pronounced against him. First, there issue three writs successively, to take the body of the defendant, if found in his bailywick or county, and to bring him to answer. The first is called a *capias*, from that mandatory word in the writ. When the sheriff cannot find him in his bailywick, he returns a *non est inventus* on the back of the writ, on which there issues a second *capias*, called an *alias*, from its reciting that *alias*, or before this, the like writ had issued. On the same return of *non est inventus* to this (for if upon any of the processes the defendant is taken, or comes voluntarily in, so as to answer, the end is obtained, and no further proceedings to outlawry go on) the third writ issues called a *pluries*, because it recites the sheriff had been *pluries*, that is, twice before, commanded to take him. The sending these three writs, one after the other, in order to bring in the party is, I presume (as, undoubtedly many of the ancient practices in our courts of law are) borrowed from the civil law; for by that law they issued three citations, at the distance of ten days, one after another, to call in the party to answer.

But as, upon a return of a *non est inventus* on the third *capias*, the personal apprehending the defendant

may well be despaired of, the law proceeds another way ; in order, if possible, to give him notice, that is, by issuing the writ of *exigent*, so called from the latin word *exigere*, to *require*, or *call upon*. This writ commands the sheriff to call the defendant in his county-court, where all the persons of the county are supposed to have business, or at least some that can inform him might have. The words are, *We command you that you cause such a one to be required from county-court to county-court, until according to the law and custom of our realm, he be outlawed if he doth not appear. And if he do appear, him to take, and safely keep, and so forth.* Now the law and custom of the realm requires, in this case, that the party should be called on five different county-court days, one after another, before he can be outlawed ; and these courts being held at the distance of four weeks from each other, the interval amounts to sixteen weeks besides the time of the three previous *capias's* ; a time so abundantly sufficient, as it is scarce to be presumed possible a person living in the county should not have notice ; and consequently, on his not appearing in the fifth court, the coroners of the county, whose duty it is, give judgement of outlawry against him.

Such is the care the common law takes to prevent outlawries by surprize. But the act of the thirty-first of Elizabeth in England, enacted here in the eleventh of James, had superadded another caution, namely, three publick proclamations. The reason of this superadded caution was, I presume, on account of the dwindling of the business in the county-courts, and, in consequence, their being not so well attended.

This writ, commanding the sheriff to make proclamation, issues with the *exigent*, and recites it, and the cause for which the proceeding to an outlawry is, and directs him to proclaim the party three several days ; first in the county-court, secondly at the quarter-sessions, a court of more resort, and lastly on a Sunday immediately after divine service, at the most usual door of the church of the parish, where the person dwelt at the time the *exigent* issued ; or if no church, in the church-yard of the parish ; or if no parish, at the nearest church ; and all outlawries in personal actions, where these solemnities are not observed, are declared void.

I have been the more particular on this head, to shew the abundant care the law has taken in these proceedings, and to vindicate it from the common complaint, of outlawries being obtained surreptitiously, and without notice. I am sensible such complaints are generally without foundation ; but if in any case they are just, the fault is not in the law, but in man, in the laws not being duly executed ; and if we are to complain of the best laws, until they be in all cases perfectly and uprightly executed, we shall never cease complaining while human nature is what it is, weak and corrupt.

§ 2 Inst. p. 15. 55.

LECTURE XL.

Continuation of the commentary on Magna Charta.

HAVING mentioned the several kinds of proceeding to judgment without the intervention of juries, practised by the courts of common law, and authorised under the words of the statute, *per legem terræ*, it will be proper, before I quit this head, to say something of other kinds of courts which do not admit this method of trial ; which, yet, have been received, and allowed authority in England ; and whose proceedings, however different from those of the common law, are justified by the same words, *per legem terræ*, These are the courts *ecclesiastical*, *maritime*, and *military*.

If we trace back the origin of ecclesiastical jurisdictions, we shall find its source in that advice of St. Paul, who reproves the new christians for scandalising their profession, by carrying on law-suits against each other before heathen judges, and recommends their leaving all matters in dispute between them to the decision of the *Ecclesiæ*, or the congregation of the faithful. In the fervor of the zeal of these times this council was soon followed as a law. The heathen tribunals scarce ever heard of any of their controversies. They were all carried before the bishop, who, with his clergy, presided in the congregation ; and who, from the deference the laity paid them, became at length the sole judges, as, in after ages, the

bishop became sole judge, to the exclusion of his clergy. These judges, however, being, properly speaking, only *arbitrators*, had no coercive power to enforce their judgments. They were obliged, therefore, to make use of that only means they had of bringing the refractory to submission, namely, excluding them from the rights of the church, and warning other Christians against their company, and indeed, it was an effectual one; for what could a Christian, despised and abhorred by the heathen, and shut out from the commerce of his brethren, do, but submit? Besides, if he was really a Christian, this proceeding seems founded on the words of the Apostle, "He that will not hear the *ecclesia*, the congregation, let him be unto thee as an heathen *."

Thus was *excommunication* the only process in the primitive church to enforce obedience, as it is in ecclesiastical courts at this day; though, considering the many petty and trifling occasions on which they are, of necessity, obliged to have recourse to these arms, having no other, and the many temporal inconveniencies it may be attended with, it has been the opinion of many wise and learned, as well as of many pious men, that it would not be unworthy the attention of the legislature to devise some other coercive means for the punishment of contempts, and to restrain excommunication to extraordinary offences only. Though, if we consider that the jealousy which the temporal courts, and the laity in general, so justly conceived of these judicatures in the time of popery, hath not even yet entirely subsided, there is little prospect that this or any other regulation to amend their pro-

* Father Paul, of beneficiary matters.

ceedings, and others they do want, will be attempted.

When the empire became Christian, these courts and their authority were fully established in the minds of the people. However, that the temporal courts might not be stripped of their jurisdiction, and churchmen become the sole judges, a distinction was made between matters of spiritual and temporal cognizance; not but several matters, originally and naturally temporal, were allowed, by the grants of the emperors, to the ecclesiastical jurisdiction; and even, of such as were not allowed them, they might take cognizance, if both the parties agreed thereto. This was called *proroguing* the jurisdiction, that is, extending, by the consent of the litigants, its power to matters that do not properly belong to it. A practice our law has most justly rejected: for it would introduce confusion, and a perpetual clashing of courts, if it was in the power of the private persons to break down the fences that the constitution has so wisely erected to keep every judicature within its strict bounds. And indeed this practice was one of the great engines the churchmen made use of, in their grand scheme of swallowing up all temporal jurisdiction and power. The method of trial in these courts was by the depositions of witnesses; and upon them the judge determined both the law and the fact.

Trials by jury were entirely unknown to the Romans, though indeed their *centumviral court*, in the early times, bore some resemblance to them; and even when the northern nations, who were the introducers of the trial *per pares*, became Christians, the ecclesiastical courts on the continent proceeded in their old manner. But in England, during the times

of the Saxons, both spiritual and temporal courts, though their business was distinct, sat together, and mutually assisted each other, as I observed under the Conqueror's reign. But whether the matter of fact in ecclesiastical causes was then tried by a jury, I will not pretend to affirm, though, from the peculiar fondness the Saxons had, above the other northern nations, for that method of trial, it may seem not improbable. However, this is certain, that from the time of William, who, to gratify the court of Rome, and to shew his own political purposes, separated the courts, the proceedings of the spiritual ones in England have been conformed to the practice of those courts abroad, and to the canon law. The alteration, if indeed there was any, was sufficiently authorised by the king and pope; and indeed as all the bishoprics were filled by Normans, they knew not how to proceed in any other manner. By the time of John, the proceedings of these courts, and their trials of causes without jury, had been universally fixed, and received as a part of the *lex terræ*, and as such, is confirmed by the words of this statute.

The next court the law of the land allows to proceed to sentence without a jury is the Court of *Admiralty*, and that for absolute necessity; for as its jurisdiction is not allowed as to any thing that happens within the body of a county, except in one particular instance, *contracts for sailors wages*, but extends only to things done on sea, or at most to contracts made in foreign countries (though this last is denied by the lawyers of our days to belong to them) there is no place from whence a jury can come. For the jury of the county, where the cause of suit arose, are the

triers, but here, it arose in none. Besides, the great excellency of this method of trial consists in this, that the jury, from their vicinity, have opportunities of knowing something of the nature of the case, and of being acquainted with the characters and credit of the witnesses, neither of which can be supposed in this case. In this court the judge determines both matter of law and fact.

The same was the case of the Constable's and Marshal's Court, formerly of great power, but now next to antiquated. Its jurisdiction was, first, *martial law*, over the soldiers and attendants of the camp. Now the trial of offenders in this kind, by a jury, whether taken out of the army, or out of the county, if in the kingdom, would have effectually destroyed that strict subordination, which is the soul of military enterprises. Secondly, they had the trials of treasons and felonies done by the king's subjects in foreign kingdoms. Here there could be no trial by jury, for the same reason as given already for the Court of Admiralty. The last part of their jurisdiction was as to precedence, arms, and marks of dignity, which flowing immediately from the grace of the crown, the sole disposer and judge of them, were not supposed to be in the cognizance of jurors, but proper to be determined by the king's judges, who had the keeping of the memorials of his grants in this kind. Besides, these honorary distinctions are not local, but universal through the realm; so that there is no particular county from whence a jury should come†.

† 4 Institut.

Such are the reasons assigned why these two courts proceed *per legem terræ*, and not by juries; but, to speak my own opinion truly, when I consider that their methods are formed upon the proceedings of the civil law, I suspect a farther design. The discovery and revival of this law happened in the reign of our Stephen. I have already had occasion to observe how greatly the princes, in every part of Europe, were flattered by the tempting bait of unlimited power it set before them, and particularly the Kings of England, who were the first who set out in pursuit of this delusive object; and that their being less successful than others was, very probably, owing to their beginning the career too early. When I consider then that these two courts, where trials by juries prevail not, dealt in matters that were of the resort of the prerogative, and that, in consequence, the modelling of them was left to the king; when I see all the parts of these models taken from the Imperial law; when I reflect on the notoriously avowed and unjust preference the weakest of them gave to that against the common law, and the kind patronage the wisest and most moderate of them shewed to it, and its possessions, down to the reign of Charles the Second, I cannot help suspecting a deeper design. And, indeed, the common lawyers seemed to take the alarm, and decryed and despised every part of this law, though most of it is founded on good reason, merely out of the apprehensions, that giving it the least countenance, might, in time, open a door for the absolute authority of the prince, and the rapaciousness of his *fisc* or treasury, and thereby overturn the constitution.

But there are other courts, besides those already named, that proceed upon the deposition of witnesses, and not by jury, I mean the courts of Equity ; which, in imitation of the civil and canon laws, oblige a party to answer upon oath to his adversary's charge. This practice, though not allowed by common law, is founded in very good reason. For, as the proper business of a court of equity is to detect fraud and surprize, these things being done in private, and endeavored to be as much concealed as possible, it is but reasonable that the plaintiff should have power to sift the conscience of his adversary, and to examine not to a single point, as the *issues* at common law are, but to many separate facts, from which, taken together, the fraud, if any, may appear. Such matters, therefore, being of nice discussion, and of a complicated nature, are not fit for the decision of a jury, and indeed would take up more time than they could possibly employ in the examination. The court, therefore, go upon *depositions*, and judge both of the law and fact. However, if a matter of fact, necessary for the decision of the cause, appears on the deposition doubtful ; or if any matter arise which these courts have no power to try, they direct an issue, wherein the point is tried by jury, in a court of common law ; and thus, these courts have the advantage of both methods of trial, as well that of the civil, as that used by the common law ; namely the oath of the party, and depositions from one, and the trial by jury from the other.

This method, however, of trial by deposition, has been objected to, as productive of enormous expense and delays ; and it cannot be denied, that, as affairs

are now conducted, there is too much reason for the objection. Yet to this it may be answered, that if examiners were more careful, and would set down nothing but what is evidence, and were the rules of the court, to cut off delays, always strictly enforced, the damage arising from both these heads would be considerably lessened. To cut off all delays, and to reduce the proceedings to as summary a method as that of the courts of common law, would (considering the matters they are conversant about are of different proof, and require the most acute examination) instead of preventing frauds in most instances, by a hurried manner of trial, serve to defend and encourage them. The policy of the common law was to reduce the matter in question to a single fact, which the jury might, with ease and convenience, determine within a convenient time. And it must be owned that the lawyers and judges of latter days, by submitting the trial of titles to lands in personal actions, have deviated much from the simplicity of the law, and weakened the excellence of the trial by jury. The present practice, of determining the title to land by an action of trespass, will serve as an instance; where the enquiry is, whether a man's entering upon lands was a trespass or not; if he had a right to enter in, it was no trespass; if he had not, it was otherwise. Now, as the right may depend upon twenty different matters of fact, beside matters of law, all which must be settled and weighed, before the bare question of trespass can be determined, it is easy to see to what lengths trial by juries may be now spun; to how short a time the examination of the most material points must be confined; how imperfect com-

sequently, the examination must often be ; to say nothing of the danger of a jury's erring when both body and mind is wearied out with long attendance, and the attention consequently enfeebled.

If it be asked, how came this deviation, which has been attended with so many inconveniences ? The true answer is the best, that it sprung from the advantage of practitioners, and the litigiousness of suitors. By the common law, no man could bring two actions of the same nature for the same thing. If I am entitled to the possession of lands, I may bring my *writ of entry*, or an *assize*, to recover it ; but if I am foiled, I cannot bring a second. So, if I am entitled to the propriety of the land, I may bring my writ of right, and if I recover not therein, my right is gone forever. The litigiousness of suitors, who had a mind to gain a method of trying the same thing over and over again, where they miscarried, introduced this method I am speaking of. For every new entry was a new trespass, and could not be said to have been tried before ; though whether it was a trespass or not, depends on what had been tried before ; and the avarice of practitioners, who desired frequent suits, encouraged it. But when once it was allowed, notwithstanding all the complaints of Coke and his co-temporary judges, it became universally followed, and is now so established, and the higher actions so much out of use, that I question whether there is a lawyer living who would be able, without a great deal of study, to conduct a cause in one of those antiquated real actions. The inconveniences of these frequent trials introduced, for the obviating them, a new prac-

tice, the applying to the court of chancery, after two or more verdicts consonant to one another, for an injunction to stop farther proceedings at law ; which, though a new, was become a necessary curb, after the common law-courts had allowed the former method.

Besides these courts already mentioned, there are many other judicatories, which, by particular acts of parliament, have particular matters entrusted to their determination, without the intervention of juries ; as the several matters determinable summarily by one or more justices of the peace ; the affairs of the revenue by the commissioners ; and suits by civil bills for limited sums by judges of assize ; though in these last the presiding judge may, and ought, in matters of difficulty, to call a jury to his assistance ; and it must be owned in this poor country the alteration of the law in this last particular, has been attended with very good consequences. The expediency of the two former changes, indeed, has been much disputed ; but that being a question of politics, not of law, I shall not enter into it.

Thus much I have observed, in a summary way, concerning the several methods of trial, differing from that *per pares*, which are authorised by those words of *Magna Charta*, *per legem tertie*.

I shall next proceed to the point of the *personal liberty of the subject* ; but as it will be proper to take all that together, in one view, I shall here conclude the present Lecture.

LECTURE XLI.

Continuation of the commentary on Magna Charta.

HAVING explained the import of the words *per legale iudicium parium suorum, vel per legem terra*, which refer to, and qualify all the preceding parts, it will be proper to mention those preceding articles, and to make some observations upon them. They then consist of six different heads. The first relates to the personal liberty of the subject ; the second to the preservation of his landed property ; the third is intended to defend him from unjust outlawry ; the fourth to prevent unjust banishment ; the fifth prohibits all manner of destruction ; and the design of the sixth is to regulate criminal prosecutions at the suit of the king. I shall briefly treat of all these particulars in the order in which they stand.

The first clause tending to secure personal liberty, runs in these words ; *Nullus liber homo capiatur vel imprisonetur. Liber homo*, as I before observed, here extends to all the subjects, and is not to be taken in its more restrained sense, of a freeholder. We see the words are not barely against wrongful imprisonment, but extend to arresting, or taking, *nullus capiatur*. This act extends not only to prevent private persons, particularly the great men, from arresting and impris-

oning the subjects, but extends also to those from whom, on account of their extraordinary power, the greatest danger might be apprehended, I mean the king's ministerial officers, his council, nay himself, acting in person. "No man," (says my lord Coke, commenting on this point,) "shall be taken, that is restrained of liberty by petition or suggestion to the king, or his council; unless it be by indictment, or presentment of good and lawful men, where such deeds be done." For in that case it is *per legale judicium parium*; though an indictment found, or a presentment made by a grand jury, in one sense, cannot properly be called *judicium*, as it is not conclusive; but the fact must be after tried by a petty jury; yet for the purpose of restraining and securing a person accused upon record, that he may be forthcoming on his trial, it is *judicium parium*. Otherwise the most flagrant offenders might escape being tried and convicted †.

In the fifteenth chapter of Westminster the first, enacted in the third year of Edward the First, and ordained to ascertain for what offences a man might be detained in prison, and to make effectual provision for the bailing out persons upon their giving security to abide a trial, those accused of the slighter offences, persons detained *per mandement de roy* by the command of the king, are mentioned as notailable; and this may seem to contradict the law I have now laid down. Yet, when rightly understood, it doth not. For as judge Gascoigne rightly said, the king hath committed all his power judicial to divers courts, some to one, some to another; and it is a rule in the

† 2d Inst. p. 46.

construction of statutes, that when any judicial act is referred to the king, it is to be understood to be done in some court of justice, according to law. The command of the king, therefore, doth not mean the king's private will, but a legal command, issued in his name, by his judges, to whom his judicial power is intrusted. Accordingly, Sir John Markham, chief justice, told Edward the Fourth, that the king could not arrest any man for suspicion of treason, or felony, as any of his subjects might ; and he gave a most excellent reason for it : Because, says he, if the king did wrong, the party could not have his action. In the sixteenth of Henry the Sixth, it was resolved by the whole court, That if the king command me to arrest a man, and I do arrest him, he shall have his action of false imprisonment against me, although I did it in the king's presence.

The maxim, then, is, that no man shall be taken and committed to prison, but by *judicium parium, vel per legem terræ*, that is, by due process of law. Now to understand this, it is necessary to see in what cases a man may be taken before presentment or indictment by a jury ; and in the enquiry it is to be considered, that process of law, for this purpose, is two-fold, either by the king's writ, to bring him into a court of justice, to *answer*, or by what is called a *warrant in law*. And this is, again, two-fold *indeed* by the authority of a legal magistrate, as a Justice of Peace's *mittimus*, or that which each private person is invested with, and may exercise.

First, then, for making a *mittimus* a good warrant, it is previously necessary, that there should be an information on oath, before a magistrate having lawful

authority, that the party hath committed an offence; or at least of some positive fact, that carries with it a strong and violent presumption that he hath so done: Next, then, the *mittimus* must contain the offence in certain, that it may appear whether the offence charged is such an one as justifies the taking; whether it is bailable, or such as the law requires the detention in prison. A warrant without the cause expressed, is a void one, and imprisonment on it illegal, and so it was adjudged in Charles the First's reign, though done by the secretaries of state, by the king's authority, with the advice of his council; thirdly, the warrant must not only contain a lawful cause, but have a legal conclusion, *and him safely to keep until delivered by law*; not until the party committing doth farther order, for that would be to make the magistrate, who is only ministerial, judicial, as to the point of the liberty of the subject; from whence might redound great mischief to the party on one hand, or to the king and public on the other, by letting an offender escape.

Let us see how far the law warrants a private person to take another and commit him to prison. First, then, if a man is present when another commits treason, felony, or notorious breach of the peace, he hath a right instantly to arrest and commit him, lest he should escape; if any affray be made, to the breach of the peace, any man present may, during the continuance of the affray, by a warrant in law, in order to prevent imminent mischief, restrain any of the offenders; but if the affray is over, so that the danger is perfectly past, there is a necessity of an information, and an express warrant; so, if one man wounds

another dangerously, any person may arrest him, that he be safely kept, until it be known whether the party wounded shall die or not. Suspicion, also, where it is violent and strong, is, in many cases, a good cause of imprisonment. Suppose a felony done, and the hue and cry of the country is raised, to pursue and take the offender, any man may arrest another whom he finds flying; for what greater presumption of guilt can there be, than for a person, instead of joining the hue and cry, as his duty prompts him, to fly from it? His good character or his innocence, how clear it may after appear, shall not avail him. His imprisonment is lawful.

Another lawful cause of imprisoning upon suspicion is, if a treason or felony is certainly done: and though there is no certain evidence against any person as the perpetrator, if the public voice and fame is, that A is guilty, it is lawful for any man to arrest and detain him. So, if a treason or felony be done, and though there be no public fame, any one that suspects another for the author of the fact may arrest him. But let him that so doth, take care his cause of suspicion will be such as will bear the test; for otherwise he may be punishable for false imprisonment. The frequent keeping company with a notorious thief, that is, one that has been convicted, or outlawed, or proclaimed as such, was a good cause of imprisonment. Lastly, a watchman may arrest a night-walker at unseasonable hours by the common law, however peaceably he might demean himself; for strolling at unusual hours was a just cause of suspicion of an ill intent. With respect to persons arrested by private authority, I must observe, that the

law of England so abhors imprisonment without a certain cause shewn, that if there is not an information on oath sworn before a magistrate, and his commitment thereon in a competent time, which is esteemed twenty-four hours, the person is no longer to be detained†.

Such is the law of England with respect to the personal liberty of the subject. Let us now see the the remedies the law provides for those that suffer by its being infringed : The writ of *odio & atia* I have already mentioned, and that it is long since out of use : The most usual way then to remedy this, and to deliver the party, is the writ of *habeas corpus*, in obedience to which, the person imprisoned is brought into court by the sheriff, who is the keeper of the prison, together with the cause of his caption and detention, that the court may judge whether the first taking was lawful ; and if it was, whether the continuance of the imprisonment is such ; and this is brought in the name of the party himself imprisoned.

The next is the writ *de homine replegiando*, or replevying a man, that is, delivering him out upon security, to answer what may be objected against him. This is most commonly used when a person is not in the legal prison, but perhaps carried off by private violence, and secreted from his friends, and therefore may be brought by a near friend having interest in the person's liberty, as by a father, or mother, for their child, or a husband for his wife. These are remedies for restoring a person unjustly deprived of liberty, to the enjoyment of that invaluable

† 2 Institut. p. 51. 55.

ble blessing. But very deficient would these remedies be, if there were no provisions made for the punishment of a person offending against his natural right, nor any relief for the person unjustly aggrieved.

For the point of punishment, an indictment will lie at the king's suit, against the false prisoner, grounded on this statute, for the vindication of the public justice of the nation ; and the party, if found guilty, shall be punished by a fine and imprisonment. For the relief of the person injured, he may have an action of false imprisonment, wherein he shall recover damages ; or an action on the case grounded on this statute, wherein he shall have the same remedy. For Coke observes on this statute, that it is a general rule, where an act of parliament is made against any public mischief or grievance, there is either given expressly, or else implied, by the law, an action to the party injured.

Such is the ancient original law of England with respect to liberty ; and so different from that of other nations of Europe, at least, as their laws are understood and practiced at present, where a man may be imprisoned without knowing his crime or accuser, or having any means, except of humble petition, to be brought to his trial. It is therefore no wonder that the people on the continent envy much the situation of the subjects of these islands, when they contemplate their own.

The next branch of the statute is *Nullus liber homo disseizetur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis*. Here it may be thought the word *liber homo* should be restrained to

freeholders, because none others can be disseised; but the following words, *libertatibus*, and *consuetudinibus*, lead by their import, to a more enlarged construction, and take in all the subjects; so that *disseizetur* must not be taken in its limited peculiar sense, but rather in general for *deprivetur*. First, then, no freeholder shall be disseised of his freehold, but by verdict of a jury, or by the law of the land, as upon default, not pleading, or being outlawed. It was made to prevent wrongful entries, by such as had a right or pretended right to the land, in order to avoid breaches of the peace and bloodshed, which often ensued thereon; but it was not intended to take away the entry of a person who had a right to enter given him by law, for that the law could never construe a *disseisen*, which is a wrongful divesting of the freehold.

To understand this it is necessary to observe, that a man may have right to the lands, and yet no right to enter upon them; or he may have both; and in the last case it is no disseisen. If A disseises B, he shall never, by his own wrongful act, deprive B of the right of possession; but he may of his own authority enter at any time, during A's life, provided he doth it without breach of the peace. But if A is dead, now the lands being thrown by the law upon A's heir, who had no hand in the wrong, and who is answerable to the Lord Paramount for the services due from the land, B has, by his own negligence, in not entering, or if he could not enter, claiming, during A's life, lost the right of possession; it is transferred to A's heir, and B must recover his right by a suit at law.

To see what is meant by *libertatibus*. It compre-

hence, in the first place, the laws of the realm, that every man should freely enjoy such advantages and privileges as these laws give him. Secondly, it signifies the privileges that some of the subjects, whether single persons, or bodies corporate, have above others, by the lawful grant of the king; as the charters of felons or outlaws, and the lands and privileges of corporations. Hence any grant of the king, by letters patent to any person, which deprives another subject of his natural right and free liberties, is against this branch of *Magna Charta*, as are all monopolies, which were so plentifully and so oppressively granted in the reigns of Elizabeth and James the First, and here in Ireland, in that of Charles the First. We must, however, except such monopolies as are erected by act of parliament, or by the king's patents, pursuing the directions of an act made for that purpose †.

Lastly, *Consuetudinibus* takes in and preserves those local customs in many parts of England, which, though they derogate from the common law, are yet countenanced and acknowledged as part of the general system of law. It also extends to any privileges which a subject claims by prescription, as wreck, waif, stray, and the like ‡.

The next clause is, *aut utlagetur*; of which having spoken already, I shall pass on to the fourth, *aut exuletur*. No man shall be banished out of the realm, *nisi per legem terræ*; for the *judicium parium* is out of this clause, there being no crime of which a man is convicted, whose sentence is banishment. The *trans-*

† 2 Inst. p. 47.

‡ 2 Inst. p. 47.

portation now commonly used for slighter felonies is not like it ; for that is by the free consent of the criminal, who desires to commute a heavier punishment for a slighter. Now *per legem terræ* a man may be exiled two ways, either by act of parliament, as some wicked minions of our former kings were, and particularly Richard the Second's corrupt judges into Ireland ; or by a man's abjuring the realm when accused of felony, that is swearing to depart out of the kingdom, never to return ; which latter is long since fallen into disuse. Coke says, that the king cannot send any subject against his will to serve him out of the realm, and the reason is strong ; for if he could under pretence of service, he might tear him from his family and country, and transport him to the remotest corner of the earth, there to remain during the whole of his life †. But what shall we say as to the military tenants, who by the very tenure of their grants were obliged to serve the king in his wars out of the realm ? Certainly, whilst the feudal system retained its pristine vigor, and personal service was required, they were an exception to this rule ; but when the commutation of *escuage* was established, they were considered as under it. Indeed their general readiness to attend their king's service in person, gave no occasion for this question's ever being decided. The famous case on this point was in Edward the Third's reign ; that prince had made many grants to Sir Richard Pembrige, some for *servitio impenso*, others for *servitio impendendo*. The king commanded him to serve in Ireland, as his Lord-deputy, which he positively refused to do, looking upon the appointment as no better than an exile ; and for this refusal the

† 2 Institut. p. 17.

king seized all that had been granted to him *pro servitio impendendo*; and the question came on in court whether the seizure was lawful. The judges clearly held the refusal lawful, and therefore would not commit him to prison; but as to the seizure, in consequence of the words *pro servitio impendendo*, without specifying where, they thought it justified. But Coke says, "it seemeth to me that the seizure was "unlawful." For *pro servitio impenso*, and *impendendo*, must be intended of lawful service within the realm. The last time this act was violated was in the reign of the misguided James the First, in the case of the unfortunate Sir Thomas Overbury; who for refusing to go ambassador to Muscovy, was by that prince sent to the Tower, in which place he was afterwards barbarously poisoned; and for his murder the favorite Somerset and his countess were both condemned to die †.

† 2 Inst. p. 48.

 LECTURE XLII.

Continuation of the commentary on Magna Charta.

THE fifth branch of this statute is in very general terms ; it is, *aut aliquo modo destruat*. “*Destruction*” is a word of very general import. Coke, in the first place, explains it by saying, “no man shall be forejudged of life or limb, or put to the torture or death, without legal trial.” But he shews afterwards, by his instances, that it is much more extensive : For he observes, that “when *any thing* is prohibited, *every thing* is prohibited which necessarily leads to it.” Every thing, therefore, openly and visibly tending to a man’s destruction, either as to life, limb, or the capacity of sustaining life, is hereby directly forbid : So that, *torture*, as it endangers life and limbs, and may prevent a man from earning his livelihood, is, on all these three accounts, unlawful, though common among all other nations of Europe, who have borrowed it from the old Roman law with respect to slaves ; a plain indication in what light the introducers of it looked on their subjects. It cannot be said that this hath never been violated in England in arbitrary times ; (as what nation is there, whose fundamental laws have not been, on occasion, violat-

ed ?) yet, in five hundred years, I do not believe the English history can afford ten instances*.

For the same reason, "judging a man, either in a civil or criminal cause, without calling him to answer and make his defence," is against this provision. So likewise is "the not producing the witnesses, that the party may have an opportunity to cross-examine them," I believe, if they may be had. For, in the case of death, or absence in a foreign country, that they cannot be produced, there is an exception, for very necessity's sake ; and in that case, the examination of such person, taken before a proper magistrate, is good evidence, though thereby the party loses the cross-examination or information against the murderer. But whenever this happens, the jury should consider that the party has lost the benefit of the cross-examination, and have that in their contemplation, when they are preparing to give their verdict. Directly contrary to this fundamental law, and to common justice, was the trial of Sir Walter Raleigh, conducted by Coke, attorney-general, upon the depositions of people who might be brought face to face. For, notwithstanding the perfect knowledge of that great lawyer in the laws of England, he was a most time-serving minister of the crown. The people of these nations are much indebted to him for his excellent writings on the law, and more for demonstrating the ancient right of the people of England to the liberties they claimed : But, if we consider that he was then in disgrace at court, I fear this panegyric must be confined to his behavior while a judge, which was without reproach ; nor did he hesitate to

* 2 Inst. p. 48.

forfeit the favor of the crown, by opposing encroachments on the law of England.

As *tending to destruction* ; it is likewise unlawful to amerce or fine a man convicted of a crime, beyond what he has a possibility of paying ; for that would tend to perpetual imprisonment, and disabling him from maintaining himself and family. Neither is it lawful, though a man be indicted of treason or felony, for the king to grant, or even to promise, the forfeiture of his lands or goods ; for this would be throwing a temptation in the way of others to suborn witnesses to his destruction. These I mention, only as particular instances, to open the import of this law ; but the words are *aliquo modo destruat*, taking in " every thing that directly tends to destruction.".... And it must be observed that these words, *aliquo modo*, are not in any other branch of this act,

I come now to the last clause of this first part, *nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, aut per legem terræ....* I observed before, from the words here being in the first person, that they refer to the suit of the king ; and they relate not only, by the latter words, to a legal trial, as to matter and form, but also to a trial in a proper and legal court. The words *nec super eum ibimus* belong to the King's Bench, where the suits of the king, the *placita coronæ*, are properly handled, and where the king is always supposed to be present. The words *super eum mittemus* refer to other courts sitting for the same purposes, as Justice of goal-delivery, for instance, under the king's commission. But when those words are coupled with the following ones, *per legem terræ*, they carry a far-

ther import ; not only that the courts, trying the king's causes, should proceed according to the law of the land, but that the courts themselves should be such as the *lex terræ* authorizes ; that is, either the common law, from time immemorial, or acts of parliament. So that the king hath no power, of his own authority, to form new criminal courts, as he may civil ones. In some cases, he appoints, indeed, the judges of the courts of common law, and issues commissions, and appoints the commissioners in criminal courts authorised by parliament ; but no farther doth his power extend.

To this it may be objected, that the king may create a county palatine, and consequently new criminal courts ; but let this be considered : Counties, and dutchies, such as we call *palatine*, were, I may say, indeed of the essence of a feudal kingdom, as ours originally was ; that is, the king might dismember a part of his kingdom from the immediate subjection to the crown, transfer a subordinate degree of the legal rights to a subject ; and when a county of that kind was created, without saying any more, all the courts, not new ones, but the same that were at common law through the whole kingdom, followed as incidents ; in the same manner as by erecting a new county, not palatine, it had its county-court, and the sheriff's tourne. These are not erecting, properly speaking, new courts, so much as bringing the old ones home to the doors of the people of that district.

As I observed at the beginning, this law naturally divides itself into two parts, the first ending at the words *per legem terræ*. Having made such observations as have occurred to me as necessary or mate-

rial for the understanding thereof, I now proceed to the latter part of this statute, which runs in these words: *Nulli vendemus, nulli negabimus, aut deferemus justitiam, vel rectum.* Some have imagined that, by these words, in the disjunctive, are meant common law and equity; but courts of equity, and proceedings in cases of equity in those courts, were not known in times so early; and the legal signification of *rectum* in old statutes, and law-books, is either the right that a man hath to a thing, or the law of the land, the means of attaining the possession and enjoyment of that right; and in that sense it is here to be taken; as Coke says, *justice*, is the end, *rectum* the means, namely, due process of law; neither of which is to be sold, denied, or delayed to the subject. In order to understand this, it will be necessary to point out some of the mischiefs that were before this act, which is the surest way to expound the meaning of any law*.

For this purpose it is to be remembered, that, in the Saxon times, almost all suits, except between grantees, were expedited in the county-courts. I have observed before, that the Conqueror and his successors discouraged these, and encouraged suits in the *Aula Regis*, or king's courts; and that the subjects were fond of suing there; but still it was a matter of favor, where the cause properly belonged to the country jurisdictions, and could not be demanded as a right. As a matter of favor, it might be denied by the king, or his chancellor, who was the issuer of the original writs, unless a sum of money was paid, such as they demanded. This was *selling* justice. Or, if

* 2 Institut. p. 55. 56.

the person to be sued was a favorite of the king, or chancellor, the writ might be denied ; this was *denying* justice. Or, if it was granted, as the proceedings were *ex gratia*, the party might, *ad libitum*, be delayed by the judges, or the cause might be stopped by order of the king, and this was the *deferring* of justice, meant by this act, which was intended for the giving every subject a right, in all cases, and against all persons, to have justice administered to him in the king's courts. The chancellor now is hereby obliged instantly to issue all original writs, and the judges of the several courts, where causes depend, to issue the proper judicial ones without fee or reward. This, however, is not so to be understood, as to prohibit the moderate and accustomed fees, which, from time immemorial, have been paid to the officer, for his trouble in making them out, or to the judge, for putting the seal ; for these are a part of their livelihood, but only those arbitrary sums which were before taken, and which the state properly calls the *selling* of justice. So likewise the judges are obliged, in every cause before them, to proceed with expedition, and to suffer no delays, but such as the law allows, and requires, for giving each party an opportunity of defence, and of laying his cause fully before the court.

However, notwithstanding this act, the evil was often repeated, and many suits stopped by the command of the king, and others, as appears by four several acts of parliament, made to enforce and explain this one, the substance of which acts is summed up by Coke in these words : That " by no means common right, or common law, should be disturbed " or delayed ; no, though it be by command, and un-

“ der the great seal, or privy seal, order, writ, letters, message, or commandment whatsoever, either from the king, or any other ; and that the justices shall proceed, as if no such writs, letters, order, message, or other commandment, were come to them.” However, this is not to be understood so strictly, but that the king may stop his own civil suit that he hath instituted for his own benefit, as a *capias* for a fine, because *quisque juri suo renunciare potest* ; and this stoppage, in truth, is for the benefit of the subject. It is otherwise in criminal accusations, unless he can shew good cause to the court to put it off. For every man accused has a right to be brought to his trial *.

Neither are legal protections within the prohibition of this law ; these were granted, to stop suits against any man that was personally employed in the service of the king, and were founded on this presumption, that such service was for the public benefit, to which all private regards must give way. But then these protections, must be legal ones, such, and none other, as are found in the Register, the ancientest book of the law, and not ones newly devised, and for new-fangled causes. These protections, however, were greatly abused in the sequel ; favorites, and their dependants, frequently obtaining them, to hinder others of their just rights, under pretence of serving the king ; where in truth, there was no such thing. It is therefore recorded, highly to the honor of Elizabeth, that she first discontinued the granting them ; and her laudable example has been followed by all her successors. I shall, therefore, not dwell

* 2 Institut. p. 56.

upon them, it being sufficient to have mentioned that such things there are, or at least *were* in our law.

I hope the prolixity with which I have treated of *this* chapter of *Magna Charta*, the care I have taken to open the true meaning and force of every word in it, and the many tacit exceptions each part of it is subject to, will be excused, when it is considered, that it not only contains great variety of matter, but is the most important, and of more general consequence and concern, than any other law of the land. It is the guardian of the life, the liberty, the limbs, the livelihood, the possessions, and to the right to justice of every individual, and therefore it concerns every man to know it and fully to understand it.

The thirtieth chapter is in favor of commerce and merchant strangers. Certain it is, that, in ancient times, the kings of Europe, and their military subjects, looked on merchandize as a dishonorable profession ; as did the Romans also, in the military ages of that republic. By the old laws of England, no merchants alien were to frequent England, except at the four great fairs ; and then were permitted to stay but forty days at a time, that is, an hundred and sixty days in the whole year. But now this act has altered the former law, and is very favorable to persons engaged in commerce, who before were little better than at sufferance. It commands that all merchants, namely, merchant strangers, whose sovereign is in amity with the King, unless publicly prohibited, that is, says Coke, by Parliament, which is true, as the law has since stood, (but before, I conceive the king himself had the power to prohibit) shall have safe and sure conduct in seven things.

First, to depart out of England without licence, at their will and pleasure. Secondly, to come into England in the same manner. Thirdly, to continue in England without limit of time. Fourthly, to go and travel through any part of England at their pleasure, by land or water. Fifthly, free liberty to buy and sell. Sixthly, without any manner of evil, tolls or taxes ; but only, Seventhly, by the old and rightful customs, that is, by such duties as were of old time accustomed to be paid, and are therefore called *Customs*. By this law the king is prohibited from laying any new taxes on the imports or exports of merchant strangers. And as now they gained a general licence to continue in the realm, from hence arose that privilege of merchant strangers to take leases for years, of houses for their dwelling, and warehouses for their goods, whilst they continued in England ; for, regularly, all acquisitions of aliens, in lands or tenements, belong to the king†.

The second branch of this act is a very equitable one. It concerns merchant enemies, or rather such merchant strangers as came in friends, and afterwards became enemies, by a war's breaking out between the sovereigns while they are in England. It provides that, on a war's so breaking out, the persons and effects of such merchants should be seized and safely kept till it should be known how the English merchants had been treated in the enemy's country ; and that, if they were well treated, these should be so too. This regulation, however, is not put in use ; because, by the treaties made between the sovereigns

† 2 Institut. p. 57. et seq. Barrington on the statutes, p. 23. 25.

of Europe, it is stipulated, that, on the breaking out of war, the merchants in each others country should have a certain number of days to withdraw themselves and their effects. But if a merchant enemy comes into the country after war declared, he is to be treated as an enemy ; to which, by the old law, now antiquated, there was a very humane exception, that of persons driven into England by stress of weather.

LECTURE XLIII.

Continuation of the commentary on Magna Charta.

AS I have dwelt on the twenty-ninth chapter of *Magna Charta* so long, and treated of it and every part of it so minutely, I shall, in this lecture, dispatch the remaining part thereof with more expedition. Indeed, of the thirty-first I would have said no more, than merely to observe, that it related to the military tenures now abolished, were it not proper to remark, that it was made to enforce the old feudal law, then the law of England, with respect to landed estates, and to restrain John's successors from the violences he had introduced in favor of the royal prerogative, to the detriment of the immunities and privileges of the subjects. It has been already observed in these lectures, that by the feudal law, especially as established by the Conqueror in England, the king was very amply provided for with a landed estate, to support his dignity and expenses, which was at that time looked on all over Europe as unalienable, except during the life of the king in being; and that the rest of the land was to be the property of the free subjects of the realm, subject to the services imposed, and the other consequences of his seignory as feudal lord.

One of these consequences was the escheat on the failure of heirs, either by there being none, or by the blood being corrupt by the commission of felony,

which in law amounted to the same thing ; as no son uncle, nephew, or cousin, could by law claim as heir by descent to a person attainted. For the legal blood, the title to the inheritance, failed in him the last possessor, by his breach of fealty ; and every heir lineal or collateral by the law of England being obliged to claim as heir to the person last seized, must be excluded, when the legal blood inheritable failed in the last possessor.

In consequence of these escheats, which often happened in those times, both by corruption of blood, and failure of heirs inheritable, (for, as I have observed before, the granting *feuda antiqua ut nova* was introduced only by Henry the Second, the father of John, and were not at this time become universal, as they since have been) John introduced this new maxim, that when an earldom or barony fell to the crown by escheat, he held it in the right of his crown, as it was originally derived from thence ; and consequently that the tenants of the former lord, being now, instead of *intermediate*, become *immediate* tenants of the crown, held of him *in capite*, as it was called ; that is, that he, by this escheat, obtained privileges over the tenants of the former lord, which he, the former lord, never had, or could have, but which he claimed as king, *in jure coronæ*. These privileges were many in number ; but it will be sufficient to mention only two of them, to shew into how much worse a state the tenants of these escheated lordships were thrown, by being considered as tenants *in capite*.

First, then, the king had from his tenants, *in capite* who came into possession of their lands at full age, instead of *relief*, to which subject lords were intitled,

and which was only one fourth of the value of the lands, his *primeir seizin*, which was the whole year's value. Another grievance was with respect to the wardship of military tenants under age. As to the tenants *in capite*, the king had, by his prerogative, a right not only to the wardship of the person of his minor tenant, and of the lands he held of him *in capite*, but also of all other lands held by knight-service of any other person. For as to socage lands, they were to be in the hands of the next of kin, to whom the inheritance could not descend, who, at the infant's full age was to be accountable for the the profits: and under the pretence of such tenants, upon the superior lord's escheat, becoming tenants *in capite*, John claimed and exacted the privilege, to the detriment of the other lords. These and other mischiefs, for others there were, as I observed before, and some of them are mentioned in this statute, are remedied by the general provision which restored the feudal law, that the king should hold all such escheated lordships in the same right they were before held, and have no other privilege, but what the lord by whose escheat they fell to him had: in a word, that he should hold them as lord of that lordship, not as king †.

The thirty-second chapter relates to the alienation of lands, and gives a qualified power of that kind. By the feudal law, as it was introduced at the Conquest, no lord could alien his seignory without the tenants consent, so neither could the tenant his tenancy, without approbation of the lord. These strict rules were first broken into, in those superstitious times

† 2 Institut, p. 64.

in favor of churchmen ; afterwards in Richard the First's time, to raise money for the holy war. Not but the subjects, by their insisting on Edward the Confessor's laws, of which free alienation was a part, seemed to be fond of it. However, the kings, in all their grants of the old English laws, were careful to preserve the feudal system, in guarding against the alienation of the military tenures. Coke, in commenting on this statute, in order to the better understanding thereof, makes three observations relative to what was the common law before this statute ; in the last of which I apprehend he is mistaken, as the law then stood ; and that what he asserts therein to have been law did not become so (though often in practice) till after the statute *quia emptores terrarum*, in Edward the First's reign.

His first observation is that the tenant might have made a feoffment of the whole, or a part of his tenancy, to hold of himself ; and no doubt but he might. This was the usual case of subinfeudation, by which the lord was in no sort prejudiced ; for his seignory remained entire, and he might distrain in any part for his whole service ; and in such case, if the under tenant was aggrieved, he was to have his remedy against his immediate landlord the *mesne*, (or middle person) as he is called in our law.

The second observation is, that the tenant could not alien in fee *apart* of the tenancy, to hold, not of himself, but of the lord, than which nothing could be more reasonable ; for it would have been against these old rules also, for a tenant to bring in another, as immediate vassal to the lord, without his the lord's consent. The tenant would by that means dismember

ber the seignory, which he received entire, and so deprive the lord of his right of distraining in the whole, and confine him merely to that part remaining in his own hands, as original tenant. For as to the part of the *alienee*, he could not distrain that for his service, there having been no feudal contract between them. Such alienation, therefore, unless when the lord accepted the *alienee* as a tenant, was a breach of fealty, and against the old feudal principles, and consequently unlawful in England.

The third observation Coke makes on this statute, is, that by the common law the tenant might have made a feoffment of the whole tenancy, to be holden of the lord. For, says he, that was no prejudice at all to the lord*. But though this certainly prevailed as common law, long before either Coke or Littleton wrote, I cannot help thinking, both because it was contrary to the old feudal law, and also from the words of the statute *quia emptores terrarum*, that it was first introduced by that act of parliament, the words of which are *de cetero liceat unicuique libero homini terras suas, seu tenementa sua vel partem, inde vendere*. Here the alienating the whole is declared from henceforth lawful; which words had been nugatory, if this had been common law before.

The chapter of *Magna Charta* of which we are speaking, was, then, the first positive law that allowed the free alienation of lands. It, in one sense, enlarged, whilst in another it expressly restrained, the power of the tenant; whereas, before he might alien the whole, or part of his tenancy in fee, but subject to the distress of the lord. Now, by this statute, he

* 2 Inst. p. 65. 67.

was confined to an alienation only for so much, that, out of what remained, the lord might have sufficient distress for his entire service, and the part conveyed was in the *alienee's* hands, free from any future distress by the lord, or service due to him, fealty only excepted. But it not being specified, how much of the land was a sufficiency, though the half, or what was the half in value, was in common estimation, reputed such, the tenants, under this pretence, would alien more ; which gave occasion to many disputes and suits, and the propensity to general alienations continuing, the law called *quia emptores terrarum*, already mentioned, was at length made, which gave a general licence to alien the whole, or a part at pleasure, to hold of the superior lord ; and this put an end, in the law of England, to subinfeudation of fee simples. For, since the passing that law, if a man infeoffs another of the whole or part of his land, there is no tenure between the feoffer and feoffee, but the feoffee holds of the feoffer's lord. But as to lower estates, as fee tail estates for life, years, or at will, subinfeudation remains ; because the whole estate is not out of the donor, or lessor, but a reversion remains in him ; wherefore the tenure, in such case, is of the donor or lessor.

By the statute of *Magna Charta*, in case of alienation of part, to hold of the lord, the residue remaining in the original tenant's hands, was to answer the services, and the *alienee* held of the lord, by fealty only. But now by the second chapter of the forementioned statute, the services were to be apportioned, that is, divided in proportion to the value of the lands. If half of the lands, not in *extent*, but *value*,

was aliened, the *alienee* paid half : if one third, the like quantity. I have observed before, on this statute of *quia emptores*, that the king, not being named, was not bound by it. For his tenant *in capite* to alien without licence was a forfeiture, until, in the reign of Edward the Third, a fine for alienating was substituted in the place of the forfeiture, which fine continued until the restoration, when it was abolished.

The thirty-third chapter provides, that the patrons, that is, the heirs of the founders of abbeys, who, by title under the king's letters patent, or by tenure, or ancient possession, were entitled to the custody of temporalities, during the vacancy of the abbey, should enjoy them free from molestation of any person, or of the king, under the pretence of the prerogative*.

The thirty-fourth chapter is relative to appeals of murder, brought by private persons. When a man is murdered, not only the king, who is injured by the loss of a subject, may prosecute the offender, but also the party principally injured, that is, the widow of the deceased, if he had one ; for she, as having one person with him, stands entitled to this remedy in the first place ; but if he left no widow, his heir at law might pursue it. It follows, therefore, that a female heir might, by the common law, have brought an appeal of murder, as the daughter, or the sister, if their had been neither children or brother. But this statute alters the common law, and takes away the appeal, in such case, from every woman, except the widow ; so that, at this day, if a man be murdered, leaving no widow, and his next heir be a female, no appeal of murder can be brought. But this dis-

* 2 Inst. p. 68. Barrington, p. 25.

ability is personal to women ; for though a daughter or sister, living, can bring no appeal, though heir, yet, if they be dead before the murder, leaving a son who is heir, he may bring it*.

I shall now make a few observations on the right of the widow's bringing such appeal. First, then, the man slain must be *vir suus*, as the statute expresses it. If, therefore, they had been divorced, the marriage being dissolved, she could not have an appeal. It was otherwise, if they had been only separated *a mensâ & thoro* ; for then he still continued her husband. He ceases likewise to be *vir suus*, if she ceases to be his wife or widow. Therefore, by her marrying again, her appeal is gone, even though the second husband should die within the year, the time limited for bringing it. This is carried so far, that though she brings an appeal while a widow, yet if she marries while it is depending, it shall abate for ever. So if she has obtained judgment of death against the *appellee*, if she marries before execution, she can never have execution against him. In one point the heir is less favored in appeals than the widow ; for if the person murdered had been attainted of high treason, or felony, so that his blood was corrupted, the heir could not have it ; for the civil relation between them was extinguished, by the ancestor's civil death : but the relation of husband and wife depends on the law of God, who has declared the bond indissoluble ; therefore no law of man can make him cease to be *vir suus*, and, in such case, she shall have an appeal.

The thirty-fifth chapter treats of the county-courts† ; but having already, in a former lecture, men-

* 2 Inst. p. 68. 69.

† Ibid. p. 69. 74.

tioned what appeared to me sufficient on that subject, I shall proceed to the next *viz.* the first law made to prevent alienations in mortmain. Lands given to a corporation, whether spiritual or lay, are said to fall into *mortmain*, that is, into a dead hand, an hand useless and unprofitable to the lord of the fee, from whom he could never receive the fruits. There could be no escheat, either for want of heirs, or felony, because the body never died, nor was capable of committing felony. For the same reason of its never dying, there could be no wardship, or relief; neither could there be marriage. But besides the loss to the lords, the public also suffered; for the military service the lands were subject to, were often withdrawn, or at least very insufficiently performed.

These alienations, without the consent of the superior lord, were directly against the feudal polity; yet such was the power of the clergy, who were the principal gainers thereby in those ages, and so great their influence, that they were not only tolerated, but universally practised through all Europe; for the founding of a monastery was the usual atonement for the most atrocious crimes. In England, particularly, from the accession of the Conqueror to that of John, containing one hundred and thirty-four years, there were no less than an hundred and four monasteries founded, many of them very richly endowed, besides particular benefactions made to them and the old ones. No wonder, then, it was found necessary, by laws, to put a stop to the growing wealth of the church; but the reign of John, a vassal to the Pope, was not a time to expect a remedy. Accordingly, this act goes no farther than to remedy a collusive

practice, by which a vassal, to defraud his lord of the fruits of his seignory, made over his lands to a convent, and took it back to hold from them ; and to that end, the statute declares the land, in such case, forfeited to the lord.

I shall say no more on this point, nor of the many cunning practices churchmen, in after times, put in use by the advice of the most learned lawyers they could procure, in order to creep out of this, and every other statute made to restrain them, and for employing which, Coke says, they were much to be commended. But he has forgot to tell us whether he thought those great lawyers deserved commendation, for finding means to elude the most beneficial laws of the land. It will be enough here to say, that, from these devices, arose in time, the wide-spreading doctrine of *uses and trusts*, which have over-run our whole law, and that the judicial powers of courts of equity have grown with them †.

The next chapter was made to restrain the intolerable exactions of *escuage* which John had introduced, and forbids the assessing it, in any other manner than was used in the time of Henry the Second, his father, that is, as I observed under that reign, very moderately ; so that every man had his option whether he would serve in person, or pay it‡.

Next comes the thirty-eighth which is the conclusion. First, it saves to the subjects all other rights and privileges before had, though not mentioned herein. Coke observes, that there is no saving for

† 2 Inst. p. 74. 75. Barrington, p. 27.

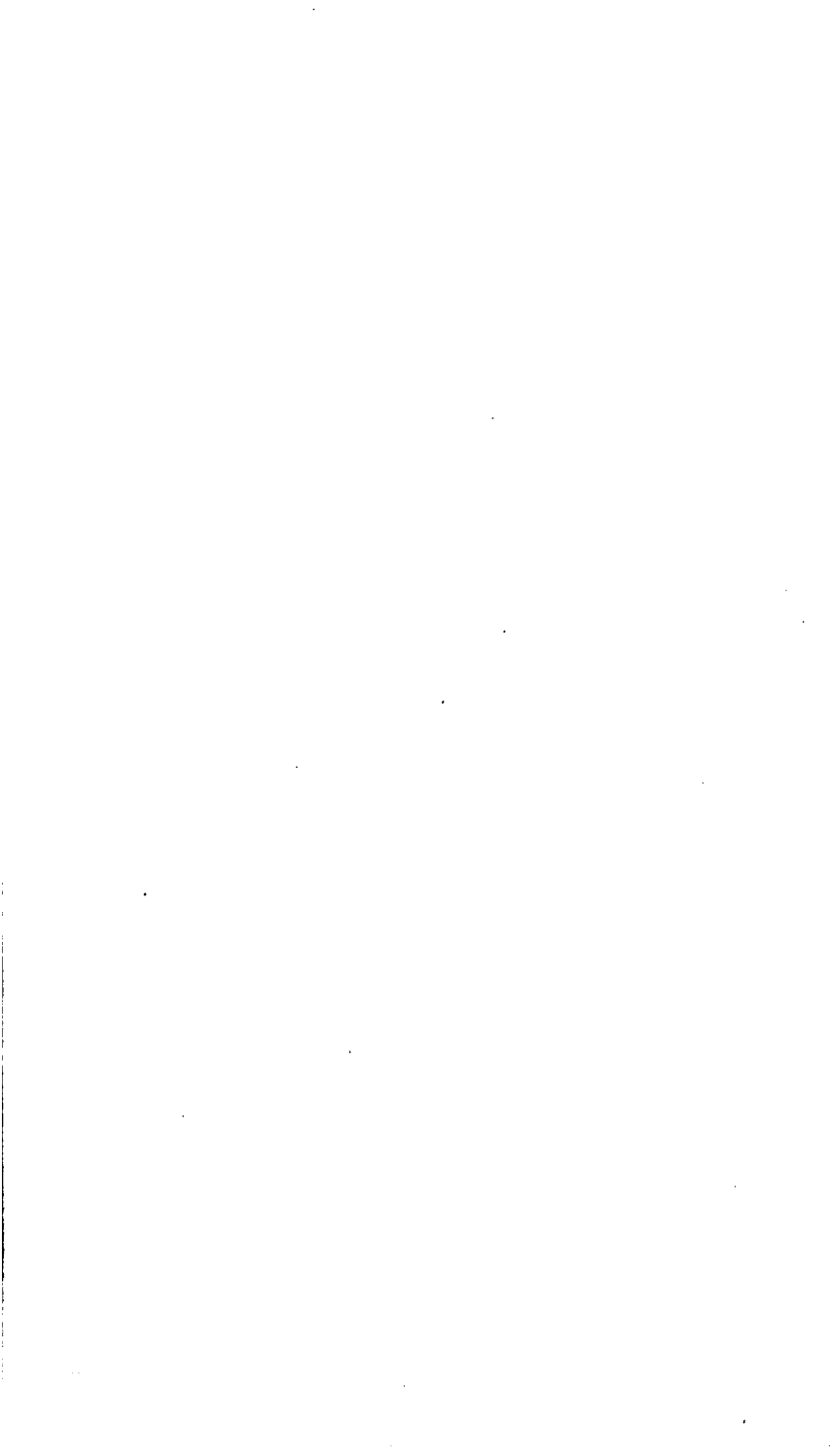
‡ Ibid. p. 76. See also 1 Inst. lib. 2. cap. Escuage. Barrington p. 28. 31.

the *perogative of the king*, or his heirs ; for that would have rendered all illusory. Secondly, it ordains that the king and his heirs should observe it. Thirdly, that all the subjects should. Fourthly, it recites, that, in consideration hereof, the king received from the subjects a grant of the fifteenth of their moveables. For *Magna Charta* is not merely a declaration of the old laws, but alters them in many instances ; for which favorable alterations the subjects made this grant, and thereby became purchasers of them. Fifthly, it prohibits the king, and his heirs, from doing any thing whereby these liberties might be infringed or weakened ; and declares all such doings null and void. Lastly, comes the alteration of twelve bishops, and nineteen abbots, and thirty-one earls and barons*.

*2. Inst. p. 76. 78.

THE END.





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☞ *The numerals refer to the volume, the figures to the page of each volume.*

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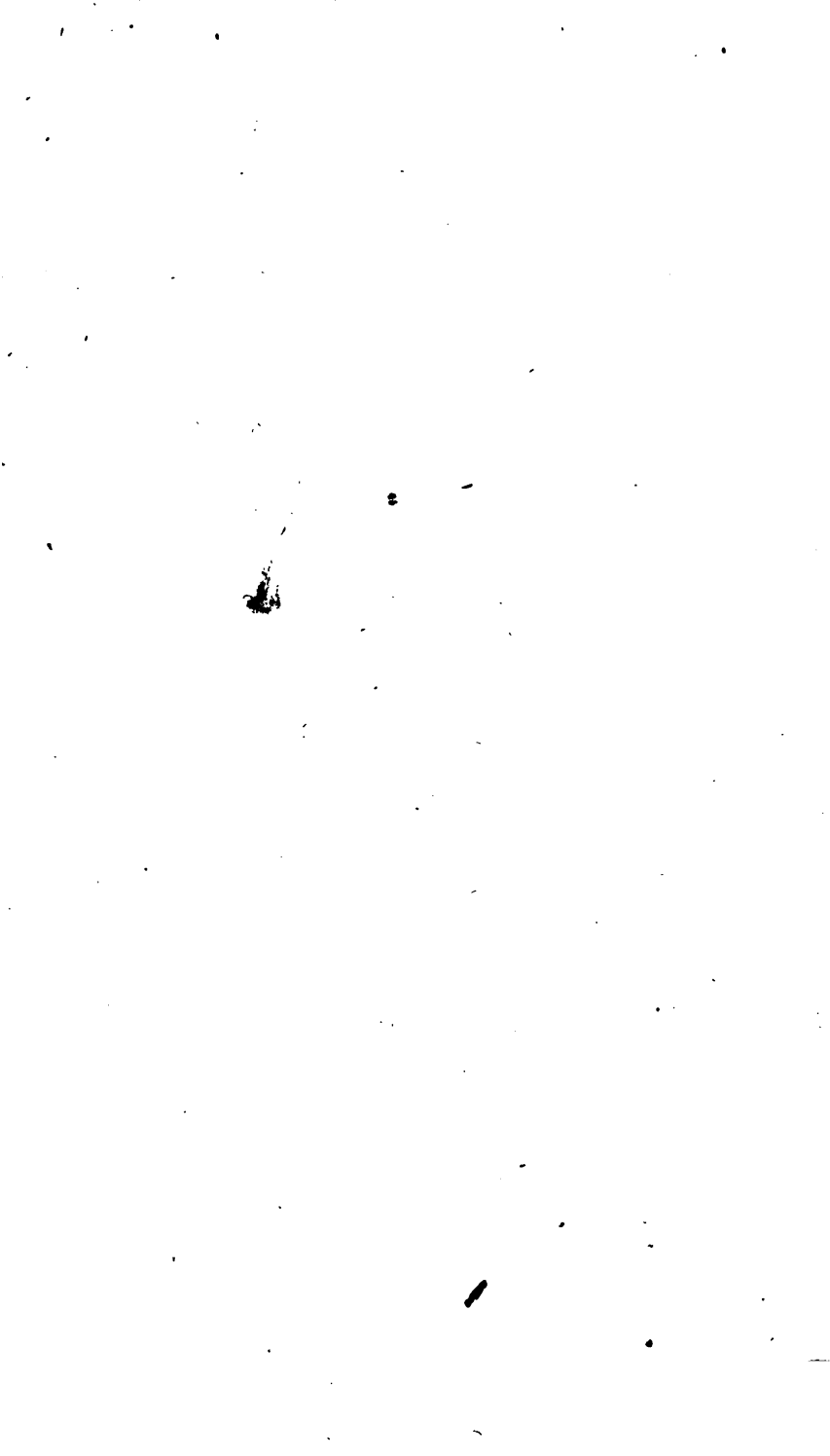
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